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ABSTRACT

As recently as the 1960s and 1970s, comparatively few persons with disabilities were able to attend college, either due to limited financial resources or to the inaccessibility of the campus and college programs. Today, colleges have substantially increased their efforts to recruit, admit, and accommodate qualified students with disabilities and to modify their programs where appropriate to provide them with the opportunity to enter, participate, and succeed. For example, an estimated 428,280 self-identified students with disabilities were enrolled in American colleges in 1997-98 (about three percent of all college students). This book describes various aspects of disability law in ten chapters: (1) introduction; (2) student disability services; (3) mental disabilities and accommodation; (4) physical disabilities, accommodations, and access; (5) admission and financial aid; (6) accommodations and modifications; (7) student records; (8) intercollegiate sport; (9) disciplinary and academic dismissal and other sanctions; and (10) disability discrimination in employment. Although simple solutions cannot be provided to resolve the complex problems identified in the above chapters, the material presented does provide a solid base on which to build. A table of cases and administrative decisions and an index conclude the book. (References contains in each chapter.) (RT)

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Students, Colleges, and Disability Law

Stephen B. Thomas

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Stephen B. Thomas

Education Law Association
Dayton, Ohio

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Dedication

I dedicate this book to my Mother, Clara Thomas. Without her support as a youth, I would not have had the opportunity to attend college. Her sacrifice made my education possible and my life better. Thank you, Mom.

About the Author

Stephen B. Thomas graduated with his B.S. and M.S. degrees from Oklahoma State University and his doctorate from the University of Florida. Since graduation, he has taught at Madison College, Texas Tech University, St. John's University, and Kent State University. He is currently responsible for teaching all of the law courses offered in the College of Education at KSU—School Law for Teachers and Administrators; Higher Education Law; Employment Law; Special Education Law; Legal Research; Advanced Education Law; Legal, Ethical, and Professional Issues in School Psychology; and the Administration of Student Disability Services. Dr. Thomas is professor and chairperson of Educational Administration (including both Higher Education Administration and Student Personnel and K-12 Administration).

Dr. Thomas has received numerous awards for his teaching and research in addition to the prestigious McGhehey Award from the Education Law Association. He has served as the president and executive director of the ELA; has authored, co-authored, or edited twenty-three books; and has published over 100 additional major articles, monographs, and case citations, plus over 200 additional minor publications—book reviews, conference proceedings, etc. Moreover, Dr. Thomas has delivered literally hundreds of conference and in-service presentations over a twenty-eight-year teaching career. He has been the keynote, general session, or preconference speaker for most major conferences within his field.

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1

Introduction

As recently as the 1960s and 1970s, comparatively few persons with disabilities were able to attend college, either due to limited financial resources (a limitation also common to persons without disabilities), or to the inaccessibility of the campus and college programs (a problem unique to the disabled). Such programs were inaccessible not just in regard to physical barriers (e.g., inadequate disability parking, inaccessible buildings and facilities), but to instructional and programmatic barriers as well (e.g., few sign-language interpreters and limited assistive technology). Moreover, until the 1980s and 1990s the vast majority of colleges and universities [hereafter referred to as colleges] lacked anything similar to an administrative unit such as "Student Disability Services" or "Office for Students with Disabilities," where students could go to document their respective disabilities, receive counseling and guidance, qualify for accommodations or modifications, and acquire adaptive technologies. Given this dearth of support, admission of purportedly unqualified students with disabilities was limited, while those who were admitted at times failed, no doubt in part due to a lack of sufficient institutional support (although effort or ability may have contributed in some instances).

Today, colleges have substantially increased their efforts to recruit, admit, and accommodate qualified students with disabilities and to modify their programs where appropriate to provide them with the opportunity to enter, participate, and succeed. As a result, more students with documented disabilities are enrolled in colleges than ever before—an estimated 428,280 self-identified students were enrolled in American colleges in 1997-98, or about 3% of all college students. Of this group, 195,870 had learning disabilities (by far the fastest growing population), 59,650 had mobility or orthopedic impairments, 49,570 had health impairments, 33,260 were mentally ill or emotionally disturbed, 23,860 were hearing impaired, 18,650 were blind or visually impaired, and 4,020 had a speech or language impediment, among others.[1] Of course, additional students were likely to have had disabilities but may have been hesitant to identify themselves (e.g., those who were HIV positive), lacked the necessary documentation, were unaware that their learning difficulties would have qualified them for accommodations or modifications, or did not know where to go for counseling or submission of documentation. The size of this group is difficult to estimate.

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[1] *An Institutional Perspective on Students with Disabilities in Postsecondary Education*, NATIONAL CENTER FOR EDUCATION STATISTICS, Aug. 1999,at 5-6.

The integration of students with disabilities into the mainstream of higher education has not been easy, nor is it likely to be in the foreseeable future. Many college officials want to provide nondiscriminatory access and equal opportunity but are unsure what steps to take; moreover, some are unaware as to what the law both requires and allows. Also, many college administrators continue to have problems regarding the development of fair and effective admission standards; the provision of appropriate, reasonable, and affordable accommodations; the identification of appropriate program modifications; the retention of quality control, given the need for individualized planning and consideration; and the difficulty of addressing increasingly complex student educational needs.

Similarly, professors vary considerably in their willingness to provide accommodation, alter their teaching style, or even change their classroom location. Seemingly few are willing to engage in holistic assessment as an alterative to using standardized test scores and grade point average (GPA) in making admissions decisions—the traditional criteria have proven to be generally successful and require far less faculty time. Also of concern is that many requests for accommodations and modifications are viewed as efforts to gain an advantage, to lower a standard, or to lessen the work load. As a result, even the most modest accommodations (e.g., increased test time; distraction-free test environment) at times are approved only because federal law or institutional policy may require them, rather than because the faculty believe that a more level playing field has resulted. Arguably, the vast majority of professors want to be fair but need a better understanding of disabilities (particularly mental disabilities) and an enhanced awareness of available options. If providing all students with an equal educational opportunity were easily accomplished, colleges would already have done so.

Although neither this text, nor any other, can provide simple solutions to the complex problems identified above, it does provide a solid base on which to build. An increased understanding of the law and awareness of the current and potential role of Student Disability Services should prepare the reader to better address issues related to admission, retention, graduation, employment, and the like. However, prior to dealing with specific issues related to disability, this chapter will review relevant federal, constitutional, statutory, and regulatory law and explain what is necessary for a person to qualify as both "disabled" and "otherwise qualified." Information presented here will be used throughout the text.

Related Federal Law

Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution stipulates that states may not deny equal protection of the law to persons within their respective jurisdictions or fail to provide due process of law if the state were to adversely affect a person's life, liberty, or property. The Equal Protection Clause has been used over the years to file claims of disability discrimination (e.g., disability-based termination of employment), in addition to those based on race, gender, national origin, and the like. Furthermore, the Due Process Clause has been the basis for claims dealing with the loss of liberty or property (e.g., a disciplinary dismissal from college without provision of an impartial hearing). It is important to note that the Fourteenth Amendment generally[2] applies only to state entities (e.g., state colleges) and does not restrict the activity of private entities (e.g., private colleges). [See Table 1-1.]

Equal Protection Clause

Fourteenth Amendment Equal Protection Clause discrimination claims may be assigned conveniently into two groups—those that are facially discriminatory and those that are facially neutral. *Facially discriminatory* claims are apparent, unhidden, clearly identifiable (e.g., if a college were to deny admission to all persons confined to wheelchairs allegedly because their buildings were not accessible). In such claims, there is no dispute as to whether discrimination has taken place; the only controversy is whether it is legal. (Additional examples of facial discrimination include the admission only of African Americans to public, historically black colleges and the admission only of men to state military academies.)

When dealing with discrimination that is facially discriminatory, three standards are used: *rational basis*, *strict scrutiny*, and

---

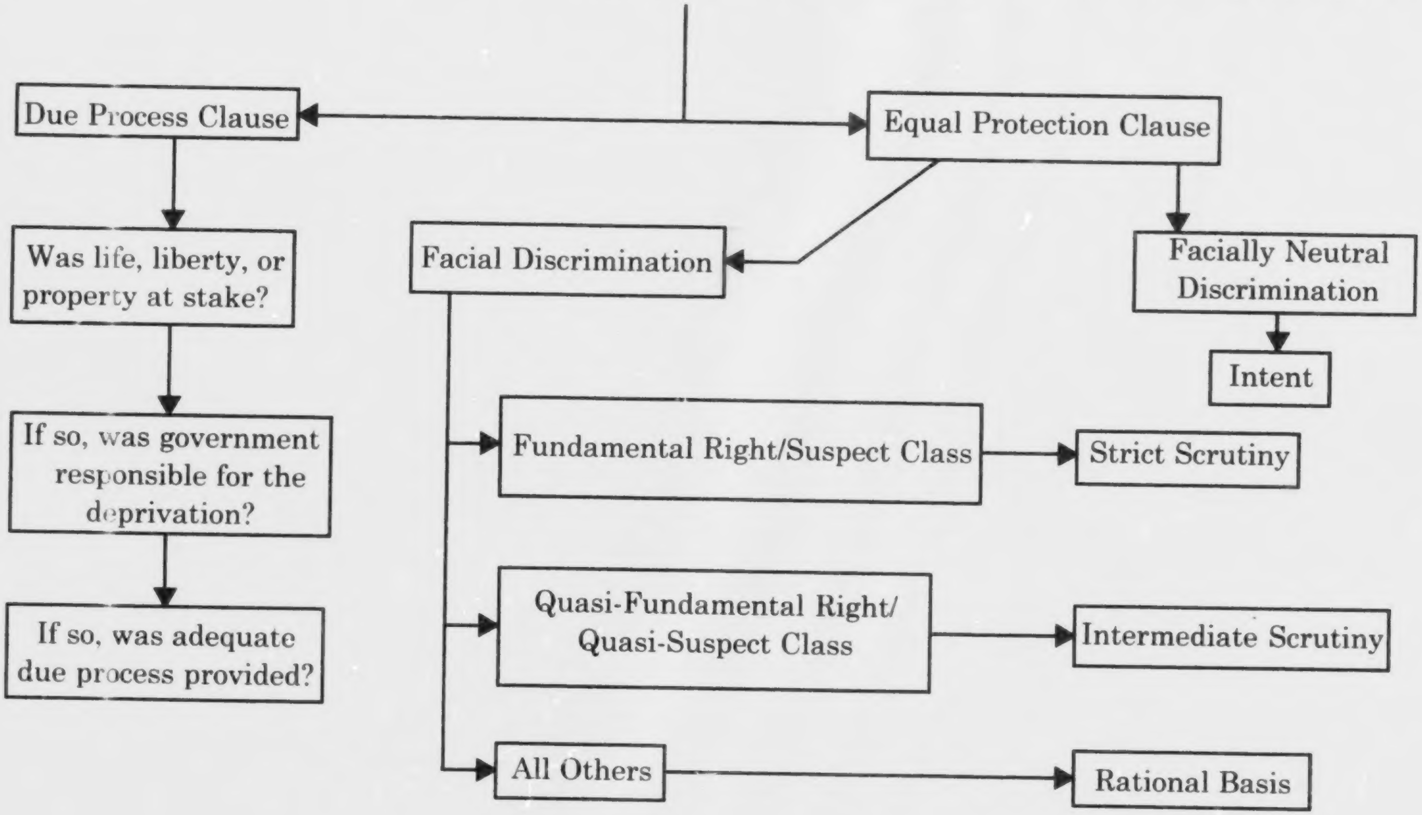
[2] *But see* Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (concluding that a state athletic association, although a private corporation, was a state actor because of its "entwinement" with public schools and the involvement of state school officials in its operations).

Table 1-1
Applicability of Selected Federal Laws Related to Disability

Federal Law	Public recipient required to comply	Public nonrecipient required to comply	Private recipient required to comply	Private nonrecipient required to comply
Fourteenth Amendment Equal Protection Clause	yes	yes	no	no
Fourteenth Amendment Due Process Clause	yes	yes	no	no
42 USC § 1983	yes	yes	no	no
RA § 504	yes	no	yes	no
ADA title II	yes	yes	no	no
ADA title III	no	no	yes	yes

Source: Stephen B. Thomas, *College Students and Disability Law*, 33:4 The Journal of Special Education 249, (2000).

Figure 1-1
Fourteenth Amendment of the United States Constitution


Due Process Clause
Equal Protection Clause
Was life, liberty, or property at stake?
Facial Discrimination
Facially Neutral Discrimination
Intent
If so, was government responsible for the deprivation?
Fundamental Right/Suspect Class
Strict Scrutiny
If so, was adequate due process provided?
Quasi-Fundamental Right/ Quasi-Suspect Class
Intermediate Scrutiny
All Others
Rational Basis

intermediate scrutiny. [See Figure 1-1.] To prevail in a case where rational basis review is used, the plaintiff has the burden of showing that the policy or practice lacks any rational basis.[3] Government action is presumed constitutional and is declared unconstitutional only if proven to be "clearly wrong, a display of arbitrary power, not an exercise of judgment."[4] As would be expected, the rational basis standard most often results in success for the defendant (i.e., the state entity). Rational basis is used where facial discrimination is present but neither of the two higher standards (see discussion below) applies (e.g., facially discriminatory disability claims).

At one time, rational basis was the only standard used in assessing whether there had been an equal protection violation. But the Supreme Court, between 1944 and 1971 (primarily includes the Warren Court—1953 through 1969), felt that some matters were too important to be reviewed under rational basis and therefore developed a higher, more demanding standard—*strict scrutiny*. *Strict scrutiny* requires the state to show a compelling interest in its actions that adversely affect either a *fundamental right* (i.e., an explicit or implied right guaranteed by the Federal Constitution—for example, the right to free speech and press, the right to vote, the right to associate, the right to procreate) or a *suspect class* (i.e., race,[5] national origin,[6] alienage[7]). Accordingly, the state would have to show a compelling interest in denying suffrage to prisoners, minorities, or women (the right to vote); sterilizing women who were mentally retarded or addicted to illegal drugs (the right to procreate); or incarcerating persons of Japanese decent during war time (national origin discrimination). Although it is not impossible to show a compelling interest, it is exceedingly difficult to do so; accordingly, decisions requiring the application of strict scrutiny are generally ruled in favor of the plaintiff.

Following the Warren Court came the more conservative Burger and Rehnquist Courts (the Burger Court lasted between 1969 and 1986; the Rehnquist Court began in 1986 and continues to this day). Unlike the Warren Court, these two more contemporary courts were reluctant to identify additional implied fundamental rights or new suspect classes, yet at times were hesitant to apply rational basis, given its leniency. Accordingly, they developed and applied a compromise standard that requires the state to show a substantial justification in affecting either a *quasi-fundamental right* (i.e., the right not to be excluded from a K-12 public education, possibly due to being an illegal alien[8] or severely disabled) or a *quasi-suspect class* (i.e., gender,[9] illegitimacy[10]). This standard is called *intermediate scrutiny*; it represents something less than is required under strict scrutiny, but something more than is required under rational basis. Although an understanding of strict and intermediate scrutiny is important to the understanding of the Equal Protection Clause, they require no further discussion in this text, as neither is used in claims of higher education disability discrimination.

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[3] Board of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

[4] Mathews v. De Castro, 429 U.S. 181, 185 (1976).

[5] Hunter v. Erickson, 393 U.S. 385 (1969).

[6] Korematsu v. United States, 323 U.S. 214 (1944).

[7] Graham v. Richardson, 403 U.S. 365 (1971).

As mentioned above, the three aforesaid standards are used when discrimination is facially discriminatory; a fourth standard is used when the allegedly discriminatory act is facially neutral—*intent*. Acts of discrimination that are facially neutral are generally more difficult to prove than are those that are facially discriminatory. As the label would suggest, facially neutral discrimination is neither obvious nor readily identifiable. Examples include the use of a timed standardized test for admissions purposes and the requirement that applicants for an athletic director's position must have had head coaching experience in football. Such practices do not explicitly screen out *all* persons with learning disabilities or *all* women, respectively. Nonetheless, they tend to disproportionately screen out many persons with learning disabilities and nearly all women. When this occurs, the plaintiff must ultimately show that his or her exclusion was due to the intent to discriminate. Proof of discriminatory impact on a protected class (e.g., that women are screened out at a significantly greater rate than are men) alone is insufficient to prove intent. Public statements, a paper trail, knowledge and availability of a less discriminatory yet effective criterion, and the like would be necessary. *Intent* applies in all Fourteenth Amendment cases where the alleged discrimination by a state actor is facially neutral, including those filed by persons with disabilities (e.g., the use of GPA when determining eligibility for intercollegiate sport; physical or endurance requirements in employment).

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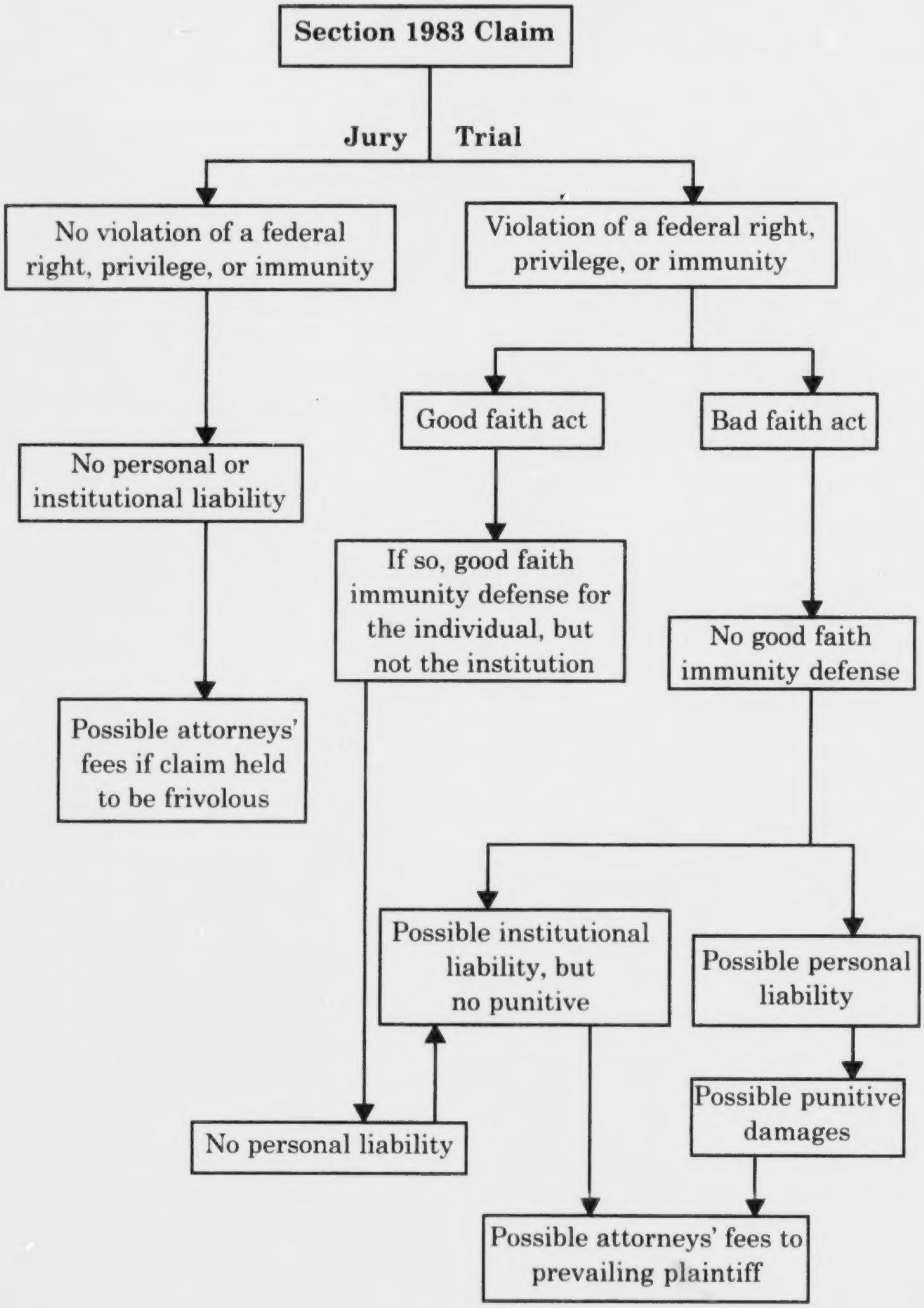
[8] Plyler v. Doe, 457 U.S. 202 (1982) (determining that illegal alien children may not be denied a public education).

[9] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[10] Clark v. Jeter, 486 U.S. 456 (1988).

Figure 1-2
Liability of State Actors
42 USC Section 1983


Section 1983 Claim
Jury
Trial
No violation of a federal right, privilege, or immunity
Violation of a federal right, privilege, or immunity
No personal or institutional liability
Good faith act
Bad faith act
If so, good faith immunity defense for the individual, but not the institution
No good faith immunity defense
Possible attorneys' fees if claim held to be frivolous
Possible institutional liability, but no punitive
Possible personal liability
Possible punitive damages
No personal liability
Possible attorneys' fees to prevailing plaintiff

Due Process Clause

The Due Process Clause requires state colleges (among other state entities) to provide both students and employees with due process of law prior to adversely affecting certain interests. In determining whether adequate due process has been provided in a higher education setting, the courts will determine whether liberty or property was denied or withdrawn; whether government was responsible for the deprivation; and whether sufficient and fair procedures were followed. Although attendance at college is not a fundamental right protected by the Constitution, it may qualify as a contract or property right. Other examples include a college scholarship, a tenured contract, and a residence hall contract. Accordingly, if a public college were to dismiss a student for violation of its conduct code, terminate the employment of a person with a tenured contract, withdraw a student's scholarship, or remove a student from a residence hall, a Fourteenth Amendment violation would occur unless an appropriate hearing was provided.

In addition to the Fourteenth Amendment, plaintiffs often "attach" a 42 USC section 1983 claim. That federal statute is discussed briefly below.

42 USC Section 1983

Section 1983 originally was part of the Ku Klux Klan Act of 1871 and now is codified as 42 USC section 1983. This statute prohibits state college officials (among other state actors) from depriving a person of any federal right, privilege, or immunity. When a plaintiff feels that a violation has occurred, the statute permits the filing of a law suit against the individual responsible for the deprivation, as well as the public college. Where college personnel act in "bad faith" (i.e., where they maliciously and wilfully deprive another of a right, privilege, or immunity guaranteed by the Federal Constitution or statutes), they may be sued individually for damages, including punitive damages (i.e., damages in excess of actual damages). On the other hand, if the employee were simply performing the job as is required by policy or directive, and were to unintentionally and unwittingly violate the statute, he or she may claim "good faith" immunity and may not be sued personally. The injured party still may sue the college, however. Furthermore, colleges may not claim a good faith defense and therefore may be sued whenever a plaintiff has had his or her federal rights violated; however, even if guilty of the alleged infringement, the college cannot be required to pay punitive damages. [See Figure 1-2.]

It also is important to note that section 1983 does not provide for any "new" substantive rights (i.e., it does not increase the number or types of protections currently available). In fact, to be applied it must be "attached" to another federal law (e.g., filing suit under section 1983 for an alleged Fourteenth Amendment violation). In doing so, plaintiffs then may broaden the range of relief available (e.g., compensatory and punitive damages) or may gain access to a jury trial when one otherwise is unavailable. Moreover, section 1988 of the same code permits the recovery of attorneys' fees to prevailing parties. However, plaintiffs and defendants do not have an equal opportunity to collect attorneys' fees as prevailing parties. To collect fees (in whole or in part), a prevailing plaintiff need only prevail on one or more of the key issues; in contrast, to collect attorneys' fees, a state defendant must support the position that the case is frivolous (unreasonable or without foundation). Although this differential common law standard represents clear precedent today, it clearly is inconsistent with the explicit wording of the statute itself, which does not distinguish between plaintiffs and state defendants in the award of fees—the statute specifically states that the prevailing party is to receive attorneys' fees. In addition to section 1983 and the Fourteenth Amendment, two additional federal statutes are commonly used by college students and employees with disabilities: the Rehabilitation Act and the Americans with Disabilities Act.

Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (RA)[11] prohibits recipients of federal financial assistance from discriminating against persons with disabilities. All public colleges and the vast majority of private ones receive either direct or indirect federal aid (e.g., student loans) and must therefore comply. Moreover, the RA was amended by the Civil Rights Restoration Act of 1987,[12] which stipulates that if aid is received anywhere within the college, the entire institution must demonstrate compliance.

To comply, the college must file an assurance of compliance (indicating that it does not discriminate due to disability) with the Assistant Secretary for Civil Rights within the Department of Education (DOE);[13] notify participants that it does not discriminate based on disability;[14] take remedial action where violations are proven;[15]

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[11] 29 USC § 794; 34 CFR § 104.

[12] 20 U.S.C. § 1687.

[13] 34 CFR § 104.5(a).

[14] 34 CFR § 104.8.

[15] 34 CFR § 104.6(a).

take voluntary action to overcome the effects of prior actions limiting the participation of persons with disabilities in the recipient's program;[16] conduct a self-evaluation to determine the level of compliance;[17] and adopt grievance procedures to deal with related complaints.[18] Section 504 of the RA regulates admissions and recruitment; requires nondiscrimination and the provision of academic adjustments; and mandates equal access to housing, financial aid, employment assistance, and nonacademic services such as athletics, counseling services, and social organizations. Additionally, colleges are required to designate at least one person to coordinate compliance efforts.[19] This is particularly helpful in large entities so that individuals will know where to go to have questions answered, to acquire necessary forms, or to file complaints. The coordinator often is responsible for overseeing college-wide efforts to make programs and buildings accessible, to instruct faculty and staff regarding the mandates of federal law, and to fulfil compliance requirements. The Office for Civil Rights (OCR) is responsible for most of the enforcement of section 504 within educational institutions.

Detailed complaint procedures are not specified in section 504; rather, procedures used in title VI of the Civil Rights Act of 1964 should be employed.[20] Consistent with title VI, complainants must file a claim within 180 days of the alleged discrimination. Department of Education officials then are responsible for investigating the claim and reviewing pertinent practices and policies in a timely manner.[21] Following its investigation, the Department must provide the complainant and the recipient with written findings. If a violation exists, federal regulations support the use of informal negotiations and voluntary action on the part of the recipient to gain compliance.[22] At no time may the recipient intimidate, threaten, coerce, or discriminate against a person who has filed a complaint or has participated in an investigation.[23] Moreover, at any time within the limitations period (see discussion below), a complainant may become a plaintiff and file suit.

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[16] 34 CFR § 104.6(b).

[17] 34 CFR § 104.6(c).

[18] 34 CFR § 104.7(b).

[19] 34 CFR § 104.7(a). *See also* Fort Hays State Univ., 4 Nat'l Disability L. Rep. 17 (OCR 1993) (finding that the University had failed to identify the employee responsible for coordinating compliance with § 504); Washington Univ., 3 Nat'l Disability L. Rep. 327 (OCR 1992) (concluding that the University had violated § 504 in regard to notice requirements, the provision of a nondiscrimination clause in the university bulletin, and the identification of a § 504 coordinator); Auburn Univ., 3 Nat'l Disability L. Rep. 286 (OCR 1992) (holding that the University had effectively notified the complainant of the identity of the § 504 coordinator; however, the University needed to establish grievance procedures for § 504 complaints); Mid-America Nazarene Coll., 2 Nat'l Disability L. Rep. 105 (OCR 1991) (concluding that the College had failed to designate a § 504 coordinator); Texas A & I Univ., 2 Nat'l Disability L. Rep. 37 (OCR 1991) (finding that the University had failed to designate a § 504 coordinator and establish a grievance procedure).

[20] 34 CFR § 104.61; 34 CFR § 104 App. A.

[21] 34 CFR § 100.7(c).

In addition to the outcome of legal action against the recipient, any recipient that fails to correct its discriminatory practices or refuses to issue an assurance of compliance also may have its federal funds terminated.[24] Notice for a related hearing to be held in the offices of the DOE in Washington, D.C. must be delivered through registered or certified mail.[25] The notice must inform the recipient of the actions the agency intends to take as well as the right to be represented by counsel. Although technical rules of evidence do not apply, the hearing officer does have the authority to exclude irrelevant, immaterial, and unduly repetitious evidence to assure the production of credible evidence.[26] Generally, the decision of the hearing officer will be the final administrative decision, although either party may request an "exception" stipulating that the officer reexamine certain issues.[27] Moreover, under "special and important" circumstances an appeal to the Secretary of the DOE is permitted.[28] If, as a result of the above hearing and review, a recipient loses federal aid, it can be restored to full eligibility when it satisfies the terms and conditions of the final order.[29]

Americans with Disabilities Act of 1990 (ADA)

Three titles of the ADA have particular application to the topics reviewed in this text: Title I prohibits employment discrimination based on disability; title II prohibits public entities (e.g., state colleges, community colleges, state licensing agencies) from denying qualified persons with disabilities the right to participate in or benefit from the services, programs, or activities they provide and from subjecting such individuals to discrimination if their adverse treatment is due to the person having a disability; and title III prohibits private entities that operate places of public accommodation from discriminating against persons with disabilities by denying them full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations they provide. Private colleges (including nonrecipient institutions, but excluding religious institutions[30]) operate places of public accommodation and are required to comply with title III. The Equal Employment Opportunity Commission (EEOC) is responsible for enforcement of title I and the Department of Justice (DOJ) is responsible for the enforcement of titles II and III.

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[22] 34 CFR § 100.7(d).
[23] 34 CFR § 100.7(e).
[24] 34 CFR § 100.8(a).
[25] 34 CFR § 100.9(a) & (b).
[26] 34 CFR § 100.9(d)(2).
[27] 34 CFR § 100.10(a).
[28] 34 CFR § 100.10(e).
[29] 34 CFR § 100.10(g)(2).

Like section 504, titles II and III of the ADA explicitly prohibit public and private colleges respectively from retaliating against any individual with a disability who has opposed any act or practice made unlawful under the ADA. The college may not discriminate against a student for charging, testifying, assisting, or participating in an investigation, proceeding, or hearing involving the college.[31] Colleges may not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of any right granted or protected by the ADA.[32] Although claims of retaliation often are difficult to prove,[33] it is possible to win a retaliation case even if the plaintiff were to lose the original suit for admission, accommodation, modification, etc. Title I is reviewed in detail in Chapter 10, while titles II and III are examined briefly below.

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[30] 28 CFR § 36.102(e). *See also* White v. Denver Seminary, 157 F. Supp. 2d 1171 (D. Colo. 2001) (concluding that title III of the ADA does not apply to a religious college).

[31] 28 CFR § 35.134(a); 28 CFR § 36.206(a).

[32] 28 CFR § 35.134(b); 28 CFR § 36.206(b).

[33] *See, e.g.*, San Francisco State Univ., 11 Nat'l Disability L. Rep. 72 (OCR 1997) (finding that the University did not retaliate against the student when it placed a hold on her records; the hold was justified because the student had failed to cooperate in an investigation into alleged misconduct); Northern Michigan Univ., 7 Nat'l Disability L. Rep. 244 (OCR 1995) (concluding that a student with Tourette's Syndrome failed to substantiate a case of dis-crimination when he was placed in one-on-one instruction or a case of retaliation when the University initiated disciplinary proceedings against him); Portland State Univ., 5 Nat'l Disability L. Rep. 424 (OCR 1994) (concluding that the University had initiated a review of the student before the OCR complaint was filed; the student had been confrontational in communication and failed to meet with teachers, attend teaching seminars, or contact staff about his teaching placement; there was no evidence that the committee retaliated against him, although one committee member did express the view that the student should have attempted to resolve his conflict with staff before filing a complaint); Burlington Coll., 5 Nat'l Disability L. Rep. 323 (OCR 1994) (finding that there was insufficient proof of retaliation); University of California, San Diego, 5 Nat'l Disability L. Rep. 163 (OCR 1993) (finding that there was insufficient evidence to support the claim of retaliation); Portland State Univ., 4 Nat'l

Title II

Title II requires public colleges (and other public entities) of fifty or more employees to appoint at least one person to coordinate compliance and investigate complaints. The college must publish the name, address, and phone number of such person or persons[34] and adopt grievance procedures that provide for the prompt and equitable resolution of complaints.[35] Complaints must be filed within 180 days of the alleged violation with the DOJ or other responsible agency.[36] If the DOJ receives the claim and does not have jurisdiction, it will refer the complaint to the appropriate agency.[37] If the receiving agency also has section 504 jurisdiction, the complaint must be processed according to procedures under that law (see summary above).[38] Otherwise, title II ADA procedures must be followed.

Under title II, when a complaint is received, the complainant and college are notified. If the file is incomplete, additional information is requested. If the information is not forthcoming, the agency will close the complaint without prejudice (i.e., the agency will not

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Disability L. Rep. 212 (OCR 1993) (finding that a student with a vision impairment had withdrawn from a course before producing documentation of his disability, had not requested adjustments until after the course was in progress, and had refused a professor's offer to defer an examination and to provide an alternative test-taking procedure; additionally, the OCR found insufficient proof of retaliation); Georgia State Univ., 5 Nat'l Disability L. Rep. 80 (OCR 1993) (finding no evidence of harassment or retaliation against a student with epilepsy and a learning disability); Skyline Coll., 4 Nat'l Disability L. Rep. 132 (OCR 1992) (concluding that a professor's statements in class, although embarrassing to the complainant, were insufficient to establish either retaliation or harassment); Teachers Coll.—Columbia Univ., 3 Nat'l Disability L. Rep. 285 (OCR 1992) (holding that a plaintiff failed to show a causal connection between the filing of an OCR complaint and her dismissal from the College); University of Wyoming, 1 Nat'l Disability L. Rep. 142 (OCR 1990) (finding that failure to remove snow from the parking lot did not constitute retaliation for having filed a complaint); Kent State Univ., 1 Nat'l Disability L. Rep. 33 (OCR 1990) (finding that when library officials failed to make archive materials available outside the library consistent with university policy, no discrimination or retaliation occurred).

[34] 28 CFR § 35.107(a).

[35] 28 CFR § 35.107(b).

[36] 28 CFR § 35.170(b)&(c).

[37] 28 CFR § 35.171(a)(2)(ii). "Designated" agencies are identified at 28 CFR § 35.190.

[38] 28 CFR § 35.171(a)(3)(i).

bar a future claim on the same cause of action).[39] When the file is complete (it includes the complainant's name and address; describes the college's alleged discriminatory action in sufficient detail; specifies the date of the alleged violation; and is signed[40]), the responsible agency then must investigate and attempt informal resolution. If a violation is identified but an agreement is not achieved, the agency will issue to the complainant and the college a letter identifying each violation and a proposed remedy as well as information regarding further rights available under the ADA.[41] Moreover, when the reviewing agency issues a letter specifying that the college has failed to comply, it then must notify the Assistant Attorney General of its findings and initiate negotiations to acquire compliance. The use of settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration are encouraged to resolve disputes.[42] If voluntary compliance is reached, the agreement (1) must be in writing and signed by the parties; (2) address each violation; (3) specify the corrective action to be taken within a specified time period; and (4) provide assurance that discrimination will not recur.[43] However, where the college refuses to enter into voluntary compliance, the agency will recommend to the Attorney General that specific actions be taken.[44] At any time, the complainant may file a private suit, regardless whether the agency identified a violation.[45]

According to federal law, a state entity may not claim Eleventh Amendment[46] immunity as a defense to a title II suit and therefore may be required to pay a monetary award where violations are found.[47] The Supreme Court has not yet addressed whether such federal law is within the authority of Congress and the Department of Education. It has, however, declared that Eleventh Amendment immunity may be claimed by state defendants in title I ADA suits.[48] [The Eleventh Amendment may not be used in title III cases as that title applies only to private providers of public accommodations while the Eleventh Amendment may be used only by state actors.] Furthermore, most courts contend that generally there is no individual or personal liability under either the RA or the ADA, although a few have held policy makers and owners liable.[49]

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[39] 28 CFR § 35.171(c).

[40] 28 CFR § 35.104.

[41] 28 CFR § 35.172(a).

[42] 28 CFR § 35.176.

[43] 28 CFR § 35.173.

[44] 28 CFR § 35.174.

[45] 28 CFR § 35.172(b).

[46] Stipulates in part that a state may not be sued in federal court for a monetary award.

[47] 28 CFR § 35.178.

[48] Board of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

The ADA was amended by the Civil Rights Act of 1991.[50] That law permits plaintiffs alleging intentional discrimination or the failure to accommodate to receive a jury trial and to seek both compensatory and punitive damages. The ADA, like section 1983 (see earlier discussion), permits the awarding of attorneys' fees, expenses, and costs[51] to prevailing plaintiffs but limits the award of fees to prevailing defendants only when a case is shown to be frivolous, unreasonable, or groundless or when the plaintiff continues to litigate unreasonably. An unsuccessful plaintiff would be responsible for the payment of his or her own attorney, related expenses, and court costs, but not have to pay for any of the costs incurred by the defendant.

Title III

The Attorney General is responsible for investigating alleged title III violations (i.e., those against private providers of public accommodations). If there is reason to believe that a violation has occurred, the college can be required to submit to a compliance review. Moreover, where a pattern or practice of discrimination exists or where perceived discrimination is so significant as to represent an issue of general public importance, the Attorney General has the authority to initiate a civil action.[52] Courts are authorized under the Act to grant temporary, preliminary, or permanent relief. Included within this general mandate, the courts may require private colleges to provide auxiliary aids or services; modify policies, practices, procedures, or methods; make facilities readily accessible to and usable by individuals with disabilities; or require other relief as the courts consider to be appropriate (e.g., monetary damages but not punitive damages[53]).[54] To vindicate the public interest, courts also are authorized to assess fines up to $55,000 for a first violation and up to $110,000 for any subsequent violations, depending on the severity of the infraction and any good faith efforts the college may have made to comply with the Act.[55]

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[49] *See* Coddington v. Adelphi Univ., 45 F. Supp. 2d 211, 217 (E.D.N.Y. 1999) (granting summary judgment on ADA and RA claims against individual defendants; observing that individuals may not be held personally liable under either of the aforementioned laws); Montez v. Romer, 32 F. Supp. 2d 1235, 1240 (D. Colo. 1999) (finding no individual liability under either the RA or title II of the ADA); Meling v. St. Francis Coll., 3 F. Supp. 2d 267, 275-76 (E.D.N.Y. 1997) (finding no personal liability under either the ADA or § 504); Doe v. Montgomery Hosp., Civil Action No. 95-3168, 1996 U.S. Dist. LEXIS 18965 (E.D. Pa. Dec. 23, 1996) (concluding that an emergency room nurse did not have the authority to shape hospital policy; as a result, she could not be held liable under the ADA); Romand v. Zimmerman, 881 F. Supp. 806, 812 (N.D.N.Y. 1995) (finding no individual liability under either the RA or title I of the ADA); Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1335 (N.D. Ca. 1994) (holding that damages are not available under title III of the ADA). *But see* Lee v. Trustees of Dartmouth Coll., 958 F. Supp. 37, 45 (D.N.H. 1997) (concluding that individuals may be personally liable under the RA if in a position to accept or reject federal funds); Guckenberger v. Boston Univ., 957 F. Supp. 306, 323 (D. Mass. 1997) (holding that a university president may be liable in his official capacity); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994) (holding that an on-call admitting physician may be held liable under the ADA); United States v. Morvant, 843 F. Supp. 1092 (E.D. La. 1994) (holding that a dentist could be liable under the ADA given that he was a sole owner, director, and president of his corporation).

[50] Pub. L. No. 102-166; 105 Stat. 1071 (1991).

[51] 28 CFR § 35.175 App. A. *See also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (concluding that the award of attorneys' fees should be based on a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith).

Statute of Limitations

Neither the ADA nor section 504 is retroactive; that is, discrimination occurring prior to each statute's effective date is not actionable.[56] Moreover, neither is explicit in regard to a statute of limitations (i.e., the time period within which a case must be filed). In identifying a limitations period, most courts have followed the lead of the Supreme Court in *Wilson v. Garcia*,[57] where it determined in a section 1983 action that it was prudent to select the limitations period used in a state statute that provides rights most analogous to the federal law. Although state laws vary, two primary approaches have been used by the courts: (1) reliance on comparable state disability law when it exists, given the common objectives of the legislation;[58] or (2) adoption of the limitations period used in personal injury statutes (e.g., tort).[59] With few exceptions (e.g., when a court adopts the doctrine of equitable tolling given that the defendant acted affirmatively to prevent discovery of the cause of action[60]), once the statute of limitations period has expired, the plaintiff will be unable to succeed in a related claim.

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[52] 28 CFR § 36.503.

[53] 28 CFR § 36.504(c).

[54] 34 CFR § 36.504(a)(1)&(2).

[55] 34 CFR § 36.504(a)(3)&(d).

[56] Boyle v. Brown Univ.., 881 F. Supp. 747 (D.R.I. 1995) (concluding that a student with chronic fatigue syndrome could not premise a title III ADA suit on conduct occurring before the effective date of the title; the statute is not retroactive).

[57] Wilson v. Garcia, 471 U.S. 261 (1985).

[58] Wolsky v. Medical Coll. of Hampton Rds., 1 F.3d 222 (4th Cir. 1993) (finding that the one-year statute of limitations used for the Virginia Rights of Persons With Disabilities Act had expired in a case where a medical student who suffered from panic disorder was dismissed and denied re-admission; the VRPDA was used rather than the two-year period for personal injury actions).

Qualifying as Disabled

Under the RA and the ADA a person with a disability is one who has a physical or mental impairment that substantially limits one or more major life activities (such as learning[61]), has a record of such an impairment, or is regarded as having such an impairment.[62] Qualifying impairments include any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting any of the following body systems: "neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[63] Specific learning disabilities include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.[64] Contagious and noncontagious diseases and conditions such as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism also are included.[65] However, the term *disability* under the ADA does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.[66] In addition, "physical or mental impairment" does not include homosexuality or bisexuality,[67] and will generally not include temporary illness or injuries (e.g., common cold or fractured leg[68]).

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[59] Everett v. Cobb County Sch. Dist., 138 F.3d 1407 (11th Cir. 1998) (finding appellant's claims to be time barred; the court applied the state two-year limitations period for personal injury actions) [Kennesaw State College was among the defendants in this case.]; Kasemeier v. Indiana Univ., 8 Nat'l Disability L. Rep. 408 (7th Cir. 1996) (holding that two-year statute of limitations for personal injuries had expired; although the suit was filed within two years of the denial of re-admission, the limitations period began to run when the school terminated its relationship with the student by removing him from the program—the student had myopia, astigmatism, and Obsessive-compulsive Disorder), *aff'd*, 99 F.3d 1142 (7th Cir. 1996); Morse v. University of Vermont, 973 F.2d 122 (2d Cir. 1992) (finding appellant's claims to be time barred; the court applied the state three-year limitations period for personal injury actions and noted that under federal law a claim accrues when the plaintiff knows or has reason to know of the injury); Cheeney v. Highland Cmty. Coll., 819 F. Supp. 749 (N.D. Ill. 1993) (finding that the two-year statute of limitations used in personal injury cases had expired where a former nursing student claimed disability discrimination in her dismissal from her program); Agron v. Trustees of Columbia Univ., 88 Civ. 6294 (MJL), 1993 U.S. Dist. LEXIS 4565 (S.D.N.Y. March 31, 1993) (applying a three-year statute of limitations and holding that a plaintiff's claim under § 504 was not time barred when she was denied re-admission notwithstanding a letter from university officials informing her that she could be re-admitted at any time in the future); Nutter v. Wefald, 3 Nat'l Disability L. Rep. 173 (D. Kan. 1992) (finding that a claim by a former student with mitral valve prolapse who had requested that the University offer her means to acquire a degree with minimal stress was time barred; state tort law provided a two-year window). *See also* Sexton v. Otis Coll. of Art & Design Bd. of Dirs., 11 Nat'l Disability L. Rep. 115 (9th Cir. 1997) (holding that a student's accommodation claim was time barred, whether for one year for personal injury claims or for two years for breach of contract claims).

[60] Baker v. Board of Regents of Kansas, 991 F.2d 628 (10th Cir. 1993)(refusing to apply the doctrine of equitable tolling to extend the limitations period—two-year statute of limitations period for personal injury actions—in a case where the plaintiff, although apparently academically qualified, had performed poorly in an interview and was not admitted to medical school; the plaintiff must show that defendant had acted affirmatively to prevent discovery of the cause of action).

[61] Included in the list are caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 34 CFR § 104.3(j)(2)(ii); 28 CFR § 35.104; 28 CFR § 36.104. The Supreme Court also has added reproduction to the list. *See* Bragdon v. Abbott, 524 U.S. 624 (1998).

A person will qualify for protection under the ADA or section 504 if he or she has a record of impairment.[69] For example, persons with a history of psychiatric hospitalization, health care for tuberculosis, or treatment for alcoholism may qualify as having a record of impairment; however, individuals who have a record of hospitalization due to the use of drugs, but are currently engaged in the illegal use of drugs, will not be protected[70] assuming that the current use and not the history of use is the basis for the adverse treatment. Similarly, a person will be regarded as having an impairment if he or she has a physical or mental impairment that does not substantially limit major life activities but is treated as though it does (e.g., discrimination against a person wearing a hearing aid, although his or her enhanced hearing is as good as that possessed by the average person in the population); has a physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward the impairment (e.g., discrimination due to being HIV positive); or has no impairment but is treated as having one (e.g., significant facial scarring due to a fire but having no further limitation).[71]

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[62] 34 CFR § 104.3(j)(1); 28 CFR § 35.104; 28 CFR § 36.104.

[63] 34 CFR § 104.3(j)(2)(i); 28 CFR § 35.104; 28 CFR § 36.104.

[64] 34 CFR § 104 App. A.

[65] 28 CFR § 35.104; 28 CFR § 36.104.

[66] 28 CFR § 35.104; 28 CFR § 36.104.

[67] 28 CFR § 35.104; 28 CFR § 36.104.

[68] Grimard v. Carlston, 567 F.2d 1171 (1st Cir. 1978) (concluding that a nursing student with a fractured and dislocated ankle was not covered by the RA and was properly excluded from participating in the clinical course for one semester).

[69] 34 CFR § 104.3(j)(2)(iii); 28 CFR § 35.104; 28 CFR § 36.104. Gardiner v. Mercyhurst Coll., 942 F. Supp. 1050 (W.D. Pa. 1995) (concluding that although a student in a police training program had a record of past psychiatric treatment, he still failed to show that he was substantially limited in any major life activity and thus failed to qualify as disabled; plaintiff was diagnosed as being immature and subject to emotional stress, but such conditions did not make him disabled).

It is important to note that college officials are not responsible for assessing students who possibly have disabilities, as is done for K-12 children under the Individuals with Disabilities Education Act.[72] It is the student's responsibility to produce documentation supporting the existence of a disability and to present such documentation to officials prior to the beginning of classes when possible. The college is not required to accept documentation provided by unqualified persons[73] or to provide accommodation without proper support.[74] Moreover, the determination of whether a person has a physical or mental impairment should be made by professionals with the appropriate credentials (e.g., psychiatrists, psychologists, physicians), rather than college staff or administrators.[75] Such professionals also will be helpful in assessing the degree to which the limitation is *substantially limiting* and in identifying appropriate accommodations and modifications. The final selection among appropriate accommodations and modifications, however, is a decision left to college officials, following consultation with the student (see discussion in Chapter 6).

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[70] 28 CFR § 35.104; 28 CFR § 36.104.

[71] 34 CFR § 104.3(j)(2)(iv); 28 CFR § 35.104; 28 CFR § 36.104. *See also* Glendale Cmty. Coll., 5 Nat'l Disability L. Rep. 36 (OCR 1993) (holding that the College had perceived an applicant to an early childhood teaching program as having a mental disability that would have substantially limited her ability to work—she had a benign essential tremor, a condition that causes pain and the body to vibrate—however, since the applicant failed to formally apply to the program, the failure to admit did not violate § 504).

[72] 20 USC § 1400.

[73] Anne Arundel Cmty. Coll., 13 Nat'l Disability L. Rep. 62 (OCR 1998) (finding no discrimination in the requirement that the student provide additional documentation supporting the existence of a disability; the documentation was supplied by a professional who was not an expert in the area of the alleged disability).

[74] Community Coll. of Vermont, 4 Nat'l Disability L. Rep. 406 (OCR 1993) (finding that the College was not responsible for providing additional accommodations to a student who had refused to provide documentation of his disability).

As mentioned above, for a physical or mental impairment to constitute a disability, its severity must result in *substantial limitation* to one or more major life activities, such as learning or working.[76] Although *substantial* has not been defined by Congress, clearly it connotes something more than a minor imposition. Beyond that point, however, federal courts have tended to disagree as to what is required. Four standards have been proposed to assess when an impairment is *substantially limiting* in regard to student complaints: *in comparison to most people in the general population*; *in comparison to the average person having comparable training, skills, and abilities*; *in comparison to the average unimpaired student*; and *the disparity between inherent capacity and performance*.[77]

The *in comparison to most people* standard was endorsed by the court in *Price v. National Board of Medical Examiners*,[78] where three medical school students with Attention-deficit Hyperactivity Disorder (ADHD) failed to qualify as disabled because their individual abilities, notwithstanding their disabilities, exceeded those of most people in the general population. The court argued that comparisons between actual and potential performance when viewed alone were insufficient and that to compare plaintiffs' performance levels to those of other medical school students was irrelevant. Moreover, the court noted that federal regulations for the ADA stipulate that a person is substantially limited when his or her life activities are "restricted as to the conditions, manner, or duration under which they can be performed in comparison to *most people*."[79] Given the explicit regulatory support, this approach has been adopted by most courts and appears most consistent with the intent of federal law.

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[75] Linson v. Trustees of the Univ. of Pennsylvania, 8 Nat'l Disability L. Rep. 299 (E.D. Pa. 1996) (finding that a former graduate student failed to establish that he was disabled, notwithstanding suggestions by university officials that he needed to undergo psychological counseling based on his abnormal behavior).

[76] Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515 (N.D. Tex. 1996) (concluding that a student with an alleged learning disability—inability to conceptually organize material—did not qualify as having a disability since the conceptual problem did not substantially limit a major life activity); Frostburg State Univ., 8 Nat'l Disability L. Rep. 246 (OCR 1995) (concluding that a student with attention deficit disorder failed to show the he qualified as disabled given that his condition was not substantially limiting); Davidson County Cmty. Coll., 6 Nat'l Disability L. Rep. 232 (OCR 1994) (concluding that a male nursing applicant with severe sciatic neuritis was not a person with a disability because his condition did not substantially limit a major life activity; moreover, his denial was based on his failure to meet entrance criteria and not age or disability); Kent State Univ., 1 Nat'l Disability L. Rep. 33 (OCR 1990) (concluding that the complainant failed to qualify as disabled under § 504 in that his bronchial asthma and occupational bronchitis were treatable with medication, were only sporadically symptomatic, and were stable).

[77] For a related discussion *see* Stephen B. Thomas, *College Students and Disability Law*, 33 JOURNAL OF SPECIAL EDUCATION 250 (2000).

[78] Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D.W. Va. 1997).

[79] 28 C.F.R. Pt. 36, App. B.

Nonetheless, the standard *in comparison to the average person having comparable training, skills, and abilities* was the one subscribed to by a federal district court in *Bartlett v. New York State Board of Law Examiners*.[80] In that case, an applicant was denied accommodation to take a state bar examination. After considering the "average person" benchmark proposed in *Price*, the court selected the EEOC standard for working (i.e., as compared to the life activity of learning) in which *substantially limits* was defined as occurring when a person is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[81] In applying this "comparable training" approach, the court found that although the plaintiff read at approximately the same level as did an average person, her reading skills were below that of her peers with comparable training (i.e., her reading ability was below that of a typical college student, let alone a typical law student). As a result, the court held that she was both disabled and otherwise qualified and had been discriminated against due to disability; the court then required the board to accommodate her in her effort to retake the examination and to provide reimbursement for prior test taking when accommodations were not provided.

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[80] Bartlett v. New York State Bd. of Law Exam'rs, 2 F. Supp. 2d 388, *rev'd in part, aff'd in part, and remanded*, 156 F.3d 321 (2d Cir. 1998), *vacating and remanding*, 527 U.S. 1031 (1999) (remanding in light of Sutton v. United Airlines, 527 U.S. 471 (1999), Murphy v. United Parcel Serv., 527 U.S. 516 (1999), and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)).

[81] 29 C.F.R. § 1630.2(j)(3)(i).

[82] 29 CFR Pt. 1630, App. § 1630.2(j).

On appeal, the Second Circuit supported the plaintiff, but for different reasons. Most courts support the EEOC position[82] that the life activity of working (given its difficulty of interpretation and application) should not be used as a basis for a court's opinion if any other life activity applies. The appeals court, by holding that Bartlett was substantially limited in reading and learning, did not have to determine whether she also was limited in working. The Second Circuit created its own error, however, by reasoning that the plaintiff's ability to read should be assessed without consideration of her history of self-accommodation (i.e., work as a teacher and the study of phonics). The court based this position on federal regulations which stipulate that a disability should be assessed without regard to the availability of mitigating measures.[83] This position has since been rejected by the Supreme Court.[84] Given that the plaintiff (i.e., a person with a J.D. and a Ph.D.) now reads at approximately the same level as the average person in the general population, she should not have qualified as disabled.

Another federal district court in *Bowers v. NCAA*[85] employed an option similar to that initially used in *Bartlett* when it concluded that the plaintiff in its case (a football player who had been declared academically ineligible to compete in intercollegiate athletics) should have his ability to learn compared to the *average unimpaired student.* To this court, the term "population" meant "student population" rather than "general population."

In contrast to the above approaches, yet another federal district court in *Pazer v. New York State Board of Law Examiners*[86] proposed that, in some instances, the *disparity between inherent capacity and performance* will help establish that the individual has a learning disability, even though the individual's performance may have met or exceeded that of the ordinary person. However, the court did recognize that each case had to be assessed on its merits and that every low achiever would not necessarily qualify as disabled.[87]

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[83] 28 CFR § 36.104 App. B; 29 CFR Pt. 1630, App. § 1630.2(j) for title I.

[84] Bartlett v. New York State Bd. of Law Exam'rs, 527 U.S. 1031 (1999) (remanding in light of Sutton v. United Airlines, 527 U.S. 471 (1999), Murphy v. United Parcel Serv., 527 U.S. 516 (1999), and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)).

[85] Bowers v. NCAA, 9 F. Supp. 2d 460 (D.N.J. 1998).

[86] Pazer v. New York State Bd. of Law Exam'rs, 849 F. Supp. 284 (S.D.N.Y. 1994).

[87] *See, e.g.*, Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998) (holding that a student's poor performance was due to a lack of motivation, preparation, and effort, rather than disability).

[88] Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985), *rev'd*, County of

The *in comparison to most people* standard has emerged as the one consistent with the wording and intent of statute in both higher education and testing cases. Had the standard for working been given judicial support (i.e., *in comparison to the average person having comparable training, skills, and abilities*), the number of persons found to qualify as disabled would have increased as would have the demand for accommodations. Each person's academic peer group then would have become the basis for determining disability status thereby dramatically increasing the number of eligible students. From the higher education administration perspective, the correction of this common law error will prove critical in ensuring that resources remain available for persons with actual disabilities.

Once a determination is made that a plaintiff is impaired and that such impairment substantially limits a major life activity, it then is necessary to ascertain whether the plaintiff also is "otherwise qualified."[88] A related discussion follows.

Otherwise Qualified

Actually, only section 504 uses the term "otherwise qualified";[89] the ADA requires only that the person with a disability be "qualified."[90] Nonetheless, for all practical purposes, the terms are equivalent and require that the person be able to meet the academic and technical requirements of a program in spite of the restrictions imposed by the disability, although reasonable accommodation may at

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Los Angeles v. Kling, 474 U.S. 936 (1985) (reversing without comment a lower court judgment that had found a nursing student with Crohn's disease to be otherwise qualified); Crancer v. Board of Regents of the Univ. of Michigan, 402 N.W.2d 90 (Mich. Ct. App. 1986) (holding that a doctoral student with Posttraumatic Stress Disorder failed to show that she was disabled under state law or that she was otherwise qualified for admission to an English Language and Literature doctoral program; plaintiff claimed that her failure to qualify was due to her inability to satisfactorily perform in the master's program because of the anxiety over her ultimate admission to the Ph.D. program); University of Illinois at Urbana—Champaign, 3 Nat'l Disability L. Rep. 251 (OCR 1991) (concluding that a student with a learning disability was not qualified to participate in an early admissions program because he was a sophomore rather than a junior and because he had completed six high school course units instead of fifteen as were required).

[89] 29 U.S.C. § 794(a).

[90] 42 U.S.C. § 12112(a).

times be necessary.[91] In *Southwestern Community College v. Davis*,[92] the Supreme Court reviewed an appeal by a hearing-impaired applicant who had been denied admission to a nursing program solely due to her disability. Admissions officials had determined that there existed no reasonable accommodation that would allow the plaintiff to safely participate in or receive the benefits of the nursing program given her dependence on lip reading. Her requested accommodation was that she not be required to take clinical courses and that a full-time supervisor be assigned to work with her. Accordingly, her participation would have required major program modifications and the lowering of standards. In ruling for the college, the Supreme Court held that the plaintiff was not otherwise qualified and that legitimate physical requirements at times may be necessary.[93] Furthermore, the Court noted that section 504 did not require affirmative action, but conceded that the distinction between accommodation and affirmative action might not always be clear.

Six years later, in 1985, the Court provided additional direction in *Alexander v. Choate* when it proposed that reasonable accommodation would allow a qualified person with a disability to have meaningful access to a program or activity but would not require "substantial" changes, adjustments, or modifications to an existing program or "fundamental" alterations in the nature of the program, with the latter representing affirmative action.[94] With this less than efficacious guidance, however, it is not surprising that courts and colleges continue to struggle in their efforts to identify reasonable accommodations and procedures that will result in nondiscriminatory admissions and participation.

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[91] 34 CFR § 104.3(k)(3). *See also* Alexander v. Choate, 469 U.S. 287 (1985) (modifying the *Davis* definition of "otherwise qualified" to include those who are capable of participating in the program if a reasonable accommodation is available); Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979) (concluding that an applicant who was deaf was not otherwise qualified for admission to a nursing program under § 504; to qualify, one must be able to meet all of a program's requirements in spite of any handicap).

[92] Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

[93] *See also* County of Los Angeles v. Kling, 474 U.S. 936 (1985).

[94] Alexander v. Choate, 469 U.S. 287 (1985).

Remaining Chapters

The remaining portions of this book will provide a description of the roles and responsibilities of personnel within Student Disability Services; an explanation of some of the more common mental and physical disabilities identified by college students and employees to support claims for accommodation and modification; and discussions regarding access, admission, financial aid, accommodation, program modification, student records, intercollegiate sport, dismissal, and employment discrimination. A chapter on policy considerations concludes the text.

2

Student Disability Services

Fifteen years ago, many colleges and universities [hereafter referred to as colleges] that operated a unit such as Student Disability Services (SDS) typically operated out of a single office with one or, at most, two employees. Technology was limited and administrative and faculty support varied. The budget generally was small, but then, only a few services were provided and comparatively few students were served. The majority of the students seeking accommodations were vision or hearing impaired or were restricted in mobility.

Today, the number of students and types of disabilities has increased significantly, the variety of assistive technology devices has grown exponentially, and the number of requested accommodations and program modifications has increased well beyond what would have been imagined by most college administrators. Moreover, the number of students with mental disabilities has grown at a considerably higher rate than has the number of students with physical disabilities, while related diagnoses have become extraordinarily complex.

With its escalation of roles and responsibilities, SDS units have become increasingly important within colleges and play a primary role in assuring compliance with the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act (RA). This chapter examines the role of the staff within an SDS unit, the procedures they follow, and the services they provide.

Staff

Student Disability Services units vary considerably in size, services, and expertise. Some are as small as a director/counselor or as large as ten or more. Ideally, the staff will include a full-time director, secretarial support (one or more, depending on workload), and specialists in assessment, sign language, assistive technology, and counseling. Even then, an occasional consultant (e.g., physician) may sometimes be necessary. Moreover, many units employ a number of graduate assistants, interns, and even undergraduate work-study students.

Director

The director is responsible for the efficient operation of the unit. Although this person may not necessarily be required to have training in medicine, psychology, technology, rehab counseling, student affairs, higher education administration, and disability law, it would be helpful, given the wide range of expertise required for the position. The director also needs to have a thorough understanding of college operations and an awareness of each unit's responsibilities and capabilities. A working knowledge of mental and physical disabilities would prove beneficial, as would a good understanding of the rights and responsibilities of college faculty (including *academic freedom*, given that this concept may at times be in conflict with federal disability law).

Assessment Expert

An assessment expert will be helpful in reviewing some of the more complex dockets, verifying diagnoses and determinations of whether identified mental impairments are substantially limiting, and ascertaining the reasonableness of requested accommodations and modification. Although the counseling staff will have training in such matters (generally from rehab counseling or special education), some of the more technical files will require specialized expertise. Furthermore, it will be helpful if the assessment expert has advanced knowledge regarding adult learning disabilities, as the number of students in this area has increased considerably.

Assessment specialists should have a comprehensive understanding of the instruments to be used, including their validity and reliability with adult populations, and be able to effectively interact with submitting parties when additional data or explanations are needed. To ensure that the college is properly represented in discussions and negotiations, assessment specialists should have academic credentials comparable to those submitting the reports (Ph.D. or Ed.S. in clinical psychology, educational psychology, neuropsychology, school psychology, counseling psychology, or learning disabilities).

Assistive Technology Expert

Specialists in assistive technology could contribute to an efficiently run SDS, but few colleges below large Carnegie Research I institutions can afford such a luxury. Therefore, the counseling and advising staff will need training for dealing with the more commonly used technologies; consultants or college faculty then could be contacted to help with the selection of devices and services in some of the more complicated cases. The growth in the number, range, and complexity of assistive technology devices and services is staggering. Having an expert on assistive technology (generally with a background in technology, special education, and/or rehab counseling) will clearly expand the kinds and quality of services a college is able to provide. As discussed in Chapter 6, college staff are not required to be on the cutting edge of technology, but should be sufficiently well informed so that they are capable of making students aware of options and alternatives they might not necessarily have considered. This type of good faith compliance with disability law shows students and the Department of Justice (DOJ) that the college is making a real effort to admit and serve students on a nondiscriminatory basis.

Nevertheless, some colleges will be reluctant to hire an expert in assistive technology, or to inform students of technologies that might not be familiar, given the budgetary limitations they are experiencing. Although there are outside agencies and special interest groups that will provide some devices at no or reduced charge, inquiries and solicitation take staff time and will increase the cost of operation. Plus, not all devices can be acquired from others and may have to be purchased, if found to qualify as reasonable accommodations.

In practice, funding plays a major role in selecting the equipment and services made available. Since neither section 504 nor the ADA provides funding such as that available under the Individuals with Disabilities Education Act[1] (a law that provides federal funding for students with disabilities at the K-12 level), and since most states provide only modest resources for higher education students with disabilities (although all provide funding at the K-12 level), the cost of accommodation is overwhelmingly absorbed by the college. Tuition payments and general state support often prove inadequate to cover these additional costs. As a result, colleges may be hesitant to make students aware of the potential use of technology—at least in regard to devices not currently available. This response could result in violations of federal disability law unless undue hardship is supported.

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[1] 20 USC § 1401.

Sign-language Interpreter

Given the complexity of appropriately accommodating persons with hearing impairments, some SDS units have employed sign-language interpreters who not only can directly communicate with hearing-impaired students when they come to the office, but who can assist in the selection of materials and provide interpreter services during class sessions and other activities qualifying students attend.[2] This person should be familiar with advances in instructional methodologies and assistive technology for the hearing impaired, and have experience as a student advocate, such as negotiating with faculty to provide proper classroom accommodation or with residence life administrators to ensure that necessary safety equipment has been properly installed.

Counselors

Most SDS units will have one or more counselors, typically with training in either counseling (e.g., rehab counseling) or psychology (e.g., school psychology, educational psychology, clinical psychology). Knowledge of assessment and experience in counseling are critical for success in this position. Such persons can assist in a range of personal and educational matters, from dealing with the stress associated with going to college to the selection of courses and accommodations. Guidance should be available to the student from the time of application up through graduation.

Graduate Assistants, Interns, and Work-Study

Given the foreseeable limits on financial resources, many SDS units have learned to depend on student labor to assist in a range of activities. Although programs differ, it is common for graduate assistants (GAs) to work within the office twenty hours per week for one to three years depending on the length of their graduate programs. They receive on-the-job training and modest compensation (generally tuition plus a $7,000 to $10,000 annual stipend—some of the more lucrative programs include room and board, health insurance, and dental and eye care). Often, these students are preparing for careers in various areas of counseling, psychology, or student affairs, and with proper training and supervision can perform many of the tasks typically assigned to professional staff within the office.

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[2] University of Maryland, 1 Nat'l Disability L. Rep. 36 (OCR 1990) (requiring the University to provided a sign-language interpreter at no charge to a student with a hearing impairment who enrolled in a noncredit course).

Most interns also are training for careers in the field, and often prove to be dedicated support staff. Unlike GAs, most interns are not paid, but rather receive course credit that is counted toward degree requirements. They often work as little as ten hours per week for only one semester. As a result, although interns should prove helpful, their benefit will be something less, on average, than GAs—their time on the job is generally brief and retraining is required with the acceptance of each new intern.

Work-study students within SDS will usually be undergraduate students, possibly with little or no training in any related field. Nonetheless, they still can be of assistance in setting up study rooms, picking up and delivering tests, acquiring parking and other permits, posting notices, answering phones, acquiring technology, and the like. There are a lot of responsibilities within SDS that do not require prior experience or advanced training. Accordingly, the use of work-study students may be beneficial, given the volume of "leg work," inquiries, and activities, assuming proper supervision.

Once the SDS unit has been provided with the necessary staff, operations may begin. Although some procedures are standard, others will vary depending on whether the alleged disability is physical or mental.

Procedures

Unlike students at the K-12 level, higher education students are responsible for documenting their own disabilities if they are to receive services or accommodations. Supportive documentation must be provided by objective professionals with the proper credentials. Evaluations submitted by family members may be rejected. Encouragement by faculty for the student to seek therapy,[3] inclusion in an application's personal statement that the student was an adult child of an alcoholic,[4] or behavior that is "bizarre" or "disturbing"[5] will be insufficient to document a disability without supportive evidence. Accepted assessments should be on professional letterhead, typed (ideally), dated, and signed.[6] Failure to provide the necessary documents can result in the denial of services.[7] Moreover, where documentation is incomplete or inadequate, additional evaluation or assessment may be requested, at student expense. A former K-12 individualized education program (IEP) or 504 service plan may be accepted to substantiate a current impairment, but may prove insufficient in and of itself, or be dated.

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[3] McGuinness v. University of New Mexico Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (noting that the professor had recommended the student see a clinical psychologist on the faculty to help him with his proposed anxiety; such referral did not qualify the student as disabled, however); Linson v. Trustees of the Univ. of Pennsylvania, No. 95-3681, 1996 U.S. Dist. LEXIS 16393 (E.D. Pa. Nov. 1, 1996) (attempting to persuade a student to seek psychological counseling did not qualify the student as disabled).

[4] Gill v. Franklin Pierce Law Ctr., 899 F. Supp. 850 (D.N.H. 1995) (concluding that a law student was dismissed due to academic performance and not due to any perceived disability).

[5] Linson v. Trustees of the Univ. of Pennsylvania, No. 95-3681, 1996 U.S. Dist. LEXIS 16393 (E.D. Pa. Nov. 1, 1996) (upholding termination of a Ph.D. linguistics student for poor academic performance, not for having filed a complaint; he failed to document that his bizarre and disturbing behavior were

It is common for colleges to request that the prospective student submit the documentation to a member of the SDS staff the semester prior to enrollment (at a minimum, colleges like four to six weeks advanced notice).[8] This will allow for proper evaluation of the student's file, provide time for re-evaluation or additional evaluation if needed, and enable the college to prepare necessary accommodations or arrange for agreed upon modifications. Similarly, the student should be encouraged to provide at least one week notice when setting up the initial interview with SDS staff to allow time for planning the advisement session; coordinating campus, building, and housing tours when necessary; and/or arranging bus or van rides with transportation services.

Assuming that a substantially limiting disability has been sufficiently documented, the college staff then will identify necessary accommodations and modifications. The student typically will be

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viewed by the faculty as substantially limiting a major life activity or that he qualified as disabled).

[6] Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432 (6th Cir. 1998) (finding that it was not unreasonable for a college administrator to reject the handwritten note of a medical doctor and to require an authoritative diagnosis of the learning disability—a learning disability that had not previously been identified).

[7] Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432 (6th Cir. 1998) (concluding that the College was not required to provide accommodations until the plaintiff had properly documented her alleged adult ADHD condition); Leacock v. Temple Univ. Sch. of Med., No. 97-7850, 1998 U.S. Dist. LEXIS 18871 (E.D. Pa. Nov. 25, 1998) (finding that the University had not discriminated against the plaintiff due to disability or owed her accommodations given that officials did not know, or have reason to know, of her disability); Goodwin v. Keuka Coll., 929 F. Supp. 90 (W.D.N.Y. 1995) (finding no obligation to accommodate simply because officials were aware that the plaintiff was seeking testing for a possible learning disability).

[8] Temple Univ., 8 Nat'l Disability L. Rep. 125 (OCR 1995) (finding no violation of federal disability law where a student did not seek academic modifications for a class until well into the academic semester).

asked to sign a form authorizing the services. Commonly requested services include counseling (academic and personal); assistance with scheduling; test proctoring; extended time for test taking; controlled environment for test taking; priority registration; referrals for personal care attendants, readers, writers, notetakers, medical suppliers, and wheelchair repair technicians; relocation of inaccessible classrooms; and coordination of sign-language interpreter services. Provisions of a personal tutor and other auxiliary aids and services for personal use often are requested, and at times provided, but are not required under federal disability law.[9] Furthermore, eligible students need to be informed about equipment availability (e.g., talking calculator, TTY/TDD, Kurzweil Reader, Visual-Tek) and provided with information regarding support groups.

In addition to the general procedures identified above, the student will be asked to submit specific documentation to support both physical and mental impairments. Related procedures are reviewed on the following page.

Mental Impairments

To support the existence of a mental impairment, the documentation must support a DSM-IV specific diagnosis (see Chapter 3). As a general rule, documentation for mental disabilities should be no more than three years old, although professional practice (e.g., psychiatry, psychology) will determine whether the period will be more or less.[10] The diagnostician is responsible for submitting a diagnosis, a description of the symptoms, and an explanation of how the disorder may affect the student as he or she interacts in a college setting.[11] Moreover, it would be helpful if the documentation included a description of how the impairment may affect any of the student's major life activities (including the ability to learn) and a list of current medications (with possible side effects). The submitting professional should be asked to recommend possible accommodations and to share any additional concerns he or she may have with SDS officials—see Example 2-1.

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[9] 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

[10] Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997) (finding that the University's previous policy adhering to a three-year requirement for currency of documentation impermissibly screened out learning disabled students; however, policy changes distributed March 1997 now permit qualified professionals to waive retesting if unnecessary).

[11] Linn-Benton Cmty. Coll., 1 Nat'l Disability L. Rep. 86 (OCR 1990) (observing that the College needed information regarding the complainant's disability and how it affects her ability to participate in and benefit from the academic program).

Example 2-1*

Verification of Mental Impairment & Disability

(to be completed by the student's psychiatrist/psychologist)

Your college's name provides diagnosed students with disabilities reasonable accommodations and modifications. However, prior to their provision, the student is required to provide current and comprehensive documentation of his or her disability. Supportive documentation includes a diagnosis of the impairment, a determination of whether the impairment substantially limits any of the student's major life activities and, if so, recommendations for accommodation. To assist us in providing the student with appropriate accommodations and modifications, please answer the following questions.

Psychiatrist/psychologist's name and title: ______________________
____
____

Psychiatrist/psychologist's area of specialization: ______________
____
____

Psychiatrist/psychologist's address: __________________________
____
____

Psychiatrist/psychologist's phone number and e-mail: ____________
____

Client's name: _________________________________
____

DSM-IV diagnosis: _______________________________
____
____
____

Date of diagnosis: _______________________________
Last contact with client: __________________________
____
____

Major life activities that are substantially affected by the impairment: [Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Also, the term "substantial" should be used in reference to "most people in the general population."]

____
____
____
____
____
____
____

Symptoms associated with the diagnosed disorder:

How this disorder may affect your client in the college's social and living environment:

Effects of the impairment on your client's ability to learn:

Client's medications, including dosages and frequency of use:

Possible adverse side effects of the medications identified above:

Recommendations for accommodation, given the nature and extent of your client's disability (e.g., extra time for testing; distraction-free test environment; reader; seating preference):

Concerns you may have regarding the ability of your client to participate in higher education or the ability of the college to effectively accommodate his or her disability:

Psychiatrist/psychologist's signature:

Date:

**This document is similar to that provided at Kent State University.*

Properly licensed psychiatrists and psychologists generally will be the persons responsible for documenting mental disabilities, depending upon state law and licensure practices. However, there may be times when a second opinion is necessary, even when all forms were completed thoroughly, because of the lack of proper credentials on the part of the submitter, the date of the original assessment, or the seemingly extreme nature of the recommendations. In instances where the two diagnoses differ, it is prudent to have a procedure where all of the evidence is presented to a knowledgeable/credentialed consultant or in-house expert. The process needs to occur without unnecessary delay so that required reasonable accommodations, if any, can be timely delivered.

"Learning disabilities" are by far the most common mental disabilities claimed today. To provide proper documentation for a learning disability, the student often is required to submit: (1) a diagnostic interview; (2) an assessment of aptitude (i.e., a complete academic assessment), academic achievement (e.g., reading, including decoding and comprehension, mathematics, and oral and written language), and information processing (short- and long-term memory, sequential memory, auditory and visual perception/processing, processing speed, executive functioning and motor ability); and (3) a diagnosis.

Diagnostic Interview

The diagnostic interview is helpful in acquiring information regarding the student's academic history and learning processes while in K-12 schools, as well as other postsecondary institutions. The diagnostician should be able to acquire information regarding the student's developmental, medical, psychosocial, family (including primary language used in the home), and employment histories, as well as a description of the perceived problem.

Assessment

A neuropsychological or psychoeducational evaluation must provide clear and specific evidence of a learning disability. The assessment and any resulting diagnosis must be based on a comprehensive assessment battery and may not be based on any single test or subtest—decisions should not be based only on an IQ test score. Standardized scores and/or percentiles should be reported for all normed measures—grade equivalents alone are not useful. For the test scores to support the existence of a disability, they need to show significant discrepancies and intra-individual differences. It also is helpful to include informational observations of the student during the administration of the battery of tests. These assessments and observations will help determine whether the impairment substantially limits a major life activity—a necessary step if the student is seeking accommodation.

When assessing adults, it is important to make sure that the instrument is both reliable and valid for the appropriate normed age group. The Association for Higher Education and Disability (AHEAD) recommends the following instruments in the measurement of aptitude: Wechsler Adult Intelligence Scale (Revised), Woodcock-Johnson Psychoeducational Battery (Revised Tests of Cognitive Ability), Kaufman Adolescent and Adult Intelligence Test, and Stanford-Binet Intelligence Scale (4th ed.). AHEAD does not support the use of either the Slosson Intelligence Test (Revised) or the Kaufman Brief Intelligence Test. Both are primarily for screening purposes and are not sufficiently comprehensive to provide the kinds of information necessary to make an accommodations decision.[12]

In regard to academic achievement, AHEAD suggests the use of Scholastic Abilities Test for Adults, Stanford Test of Academic Skills, Woodcock-Johnson Psychoeducational Battery (Revised Tests of Achievement), and Wechsler Individual Achievement Test. For specific achievement tests, the Nelson-Denny Reading Skills Test, the Stanford Diagnostic Mathematics Test, the Test of Written Language-3, and the Woodcock Reading Mastery Tests (Revised) are recommended. The Wide Range Achievement Test-3 is not considered to be a comprehensive measure of achievement and should not, therefore, be used.[13]

AHEAD also has provided recommendations for instruments to measure information processing. Preferred instruments include the Detroit Tests of Learning Aptitude-3, the Detroit Tests of Learning Aptitude-Adult, subtests of Wechsler Adult Intelligence Scale (Revised), and Woodcock-Johnson Psychoeducational Battery (Revised Tests of Cognitive Ability).[14]

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[12] *Guidelines for Documentation of a Learning Disability in Adolescents and Adults*, AHEAD, *at* http://www.ahead.org/ldguide.htm (July 1999).

[13] *Id.*

[14] *Id.*

Diagnosis

Any diagnosis that is eventually provided must be clearly stated with direct language. Diagnosticians should avoid ambiguous language such as "suggests" or "is indicative of" and be specific about the nature and extent of any perceived impairment. It is important to note that variances in learning style, learning differences, academic problems, test difficulty, and anxiety will not qualify as disabilities without more evidence.[15] Moreover, alternative explanations for poor performance such as emotional, attentional, or motivational problems; poor study habits or prior education; and cultural or language differences do not support a disability diagnosis.[16] The clinical summary should be based on test results, observations, and the like, and must include an indication of how patterns in the student's cognitive ability, achievement, and information processing reflect the presence of a learning disability; opinions as to whether the person's impairment substantially limits a major life activity *and* the degree to which the disability impacts the individual in the area where accommodations are being requested (for example, dyslexia may adversely affect the individual's ability to read quickly and might therefore result in the need for a reader during a timed test); and an explanation of why specific accommodations are needed. If a disability is not identified or if a recognized impairment does not *substantially* limit a major life activity, the college is not required to provide accommodations and modifications.

Physical Impairments

Documentation should be provided by a physician to support the existence of a physical disability, although supportive materials from other professionals (for example, documentation from a chiropractor) may prove helpful, depending on the type of disability (see Chapter 4). If the physician or other professional lacks the necessary specialization to make a proper diagnosis, the student can be required to seek corroborating documentation. The procedure mentioned above, involving a consultant or in-house expert to assess conflicting documentation from two or more submitters, also is recommended in cases dealing with physical disabilities. Preferably, documentation will include a diagnosis, an explanation of how the impairment affects a major life activity (including the student's ability to learn), a list of medications (including possible side effects), recommendations for accommodation, and an explanation of any further concerns—see Example 2-2. Although SDS may select a cut-off date for the age of documentation, such decisions must be based on current professional practice and not be arbitrarily determined. Some impairments (e.g., many health conditions) may require recent information, while other physical impairments, such as blindness, may be substantiated with older supportive documents. If documentation is faxed, it is necessary to request that the original document be mailed so that the college will eventually have it on file.

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[15] *E.g.*, McGuinness v. University of New Mexico Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (holding that when an impairment is limited to specific stressful situations, such as math and chemistry tests, it will not qualify as a disability; moreover, granting a passing grade when it has not been earned is not a reasonable accommodation); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515 (N.D. Tex. 1996) (concluding that the inability to conceptually organize material on a Ph.D. comprehensive examination did not qualify as a disability).

[16] For example, the complainant in Pepperdine Univ., 7 Nat'l Disability L. Rep. 62 (OCR 1995) had significant attentional problems, but also was dyslexic.

Guidelines for the Practitioner

Although SDS units vary markedly in size, budget, and services, there still are certain activities in which virtually all should engage to appropriately serve students with disabilities, demonstrate compliance with the ADA and section 504, and avoid litigation.

(1) Hire only those staff who have proper credentials and are dedicated to the service of students with disabilities.

(2) Establish, publish, and promulgate procedures to be followed for a student to quality for disability services and to receive reasonable accommodations and program modifications.

(3) Uniformly follow the procedures identified in number 2 above.

(4) Within those procedures, require that students who are requesting accommodations be fully responsible for documenting the impairment, showing that the impairment substantially limits a major life activity, and supporting the need for accommodation.

(5) Follow professional practice in establishing cut-off dates for documentation.

Example 2-2*

Verification of Physical Impairment & Disability

(to be completed by the student's physician/specialist)

Your college's name provides diagnosed students with disabilities reasonable accommodations and modifications. However, prior to their provision, the student is required to provide current and comprehensive documentation of his or her disability. Supportive documentation includes a diagnosis of the impairment, a determination of whether the impairment substantially limits any of the student's major life activities and, if so, recommendations for accommodation. To assist us in providing the student with appropriate accommodations and modifications, please answer the following questions.

Physician's name and title: ______________________________
____
____

Physician's area of specialization: ______________________
____

Physician's address: ______________________________
____

Physician's phone number and e-mail: ____________________
____
____

Patient's name: ______________________________
____

Diagnosis: ______________________________
____
____

Date of diagnosis: ______________________________
Diagnosed physical impairment(s): ______________________
____
____

Major life activities that are substantially affected by the impairment: [Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Also, the term "substantial" should be used in in reference to "most people in the general population."]

____
____
____

Symptoms associated with the physical or medical impairment:

Effects of the impairment on your patient's ability to learn:

Patient's medications, including dosages and frequency of use:

Possible adverse side effects of the medications identified above:

Recommendations for accommodation, given the nature and extent of your patient's disability:

Concerns you may have regarding the ability of your patient to participate in higher education or the ability of the college to effectively accommodate his or her disability:

Physician or specialist's signature:

Date:

**This document is similar to that provided at Kent State University.*

(6) Accept documentation only from properly licensed professionals.

(7) Review documentation promptly, and involve the student when selecting reasonable accommodations.

(8) Document all inquiries, discussions, meetings, and hearings.

(9) Deliver all agreed upon services at the appropriate times.

(10) Return calls, letters, and e-mails promptly.

(11) Establish positive, supportive relationships with student clients.

3

Mental Disabilities and Accommodation*

The determination of physical disabilities has generally been straight-forward and without much controversy. This is because the disability is usually concrete and visible to the observer and its presence and extent can be assessed by relatively objective measures. The determination of mental disabilities, by contrast, has been fraught with controversy. This is true for several reasons. First, because they are largely invisible, their existence must be inferred by behavioral samples, reports of other people, or paper-and-pencil measures. None of these data sources is an exact measure, however. Behavioral samples can vary considerably depending on when they are taken, by whom, and under what conditions. Significant others can vary in their ability to provide exact data because their ability to report accurately is subject to their own perceptual distortions due to their hopes, fears, and wishes. Paper-and-pencil measures are only approximations of reality and their reliability and validity are never perfect and may vary considerably.

Second, psychiatric disabilities are partly, perhaps largely, socially constructed entities. That is, they have no true reality of their own but are conceptual categories which reflect not only changing psychiatric thinking but sociopolitical reality as well. This can be easily seen by examining the various iterations of the *Diagnostic and Statistical Manual* (DSM) of the American Psychiatric Association over the years—from DSM-I to DSM-IV.[1] For example, homosexuality was until recently defined as a psychiatric disorder but more recent understanding of human sexuality (as well as political pressure and legality) now suggest that it is not *in itself* a disorder. Homosexuals may have emotional problems but those are now attributed to other causes, including society's responses to homosexuality. Even earlier, masturbation was considered to be a disorder though it no longer is, in mainstream opinion. Hysteria, common in Freud's day, has now essentially become Histrionic Personality Disorder. By contrast, new disturbances, such as Borderline Personality Disorder and Multiple Personality Disorder, have recently been "discovered."

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* The authors of this chapter were E. Thomas Dowd and Mary Beth Javorek. The authors also would like to thank Dr. Nancy Docherty for her comments on a first draft of this chapter.

[1] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (AMA, 1994).

Third, many of the psychiatric disorders represent extreme variations of the human condition rather than distinct entities. There is generally no clear demarcation point between simple eccentricity and a personality disorder. When, for example does typical ("normal") adolescent rebellion become a Conduct Disorder? At what point does a social drinker become an alcoholic? Are illegal substances, even taken in "moderation," disorders by reason of their legal status? In addition, different cultures (or even the same culture at different points in time) may define the demarcation point between eccentricity and disorder differently. Other societies, even our own at times, may tend to label individuals with different points of view as "mentally ill," thus eliminating the need to critically examine unspoken assumptions in their society. The former Soviet Union, for example, was notorious for labeling political dissidents as insane and incarcerating them as such, presumably on the grounds that anyone who could not recognize an obviously perfect society must be mentally ill. Our society has done similar things on occasion, though it is more difficult for us to see it. Recently a prominent athlete was forced to undergo a psychiatric examination because he had made racist and derogatory comments in a media interview, suggesting that we view such offensive remarks as indicating mental illness rather than boorishness.

Thus, it can be seen that people often differ widely in how they perceive, react to, and interpret events and these differences can affect their ability to learn. These differences may reflect not only psychiatric/psychological variations but also biological temperamental differences.[2] It is often very difficult to determine whether these individual differences in themselves represent a disability that should result in an accommodation, whether they are normal human variations, or whether they are simply self-serving excuses for poor performance. Some conditions, such as obsessive-compulsive behavior, may even be facilitative of learning—at least in moderation. In this chapter, a variety of psychiatric disorders are described that may require accommodation, as well as common methods of assessing these disorders. This description is based on the official nomenclature of psychiatric disabilities as described in DSM-IV. Accommodations that may reasonably be required are then identified.

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[2] L. SPERRY, COGNITIVE BEHAVIOR THERAPY OF DSM-IV PERSONALITY DISORDERS (Brunner/Mazel 1999).

Assessment

The most common and perhaps the most unreliable assessment method is the clinical interview. Although trained personnel such as psychiatrists or psychologists conduct these interviews, it is not uncommon to find disagreement regarding the severity or even the presence of psychiatric disorders. In part this is due to the continuous distribution of psychiatric disorders in the population so that it may be difficult to understand when normality ends and a disorder begins. It also is due to the difficulty of asking a sufficient number or the right kinds of questions to elicit the information needed. Individuals often may dissemble in an attempt to present themselves in the best or the worst possible light in order to obtain as much gain from a situation as possible. Finally, although the DSM-IV and its predecessors attempted to describe the disorders as specifically as possible, it can sometimes be difficult even for trained professionals to make an accurate differential diagnosis.

There are standardized assessment instruments that can be used, although some are more often used for research than clinical work. Perhaps the most common and certainly the most comprehensive is the Structured Clinical Interview for DSM (SCID).[3] It is quite lengthy, however, taking about two hours or more to administer. Other shorter instruments have been developed for specific disorders. For example, the Beck Depression Inventory (BDI) and the Beck Anxiety Inventory (BAI) were designed by Aaron T. Beck, M.D. to measure these constructs. The interested reader can obtain information about a variety of specific assessment inventories in such publications as the *Mental Measurements Yearbooks*, published periodically by the Buros Institute of Mental Measurements at the University of Nebraska. On occasion, especially for learning disorders and other neurologically-based disorders, a comprehensive psychoeducational or neuropsychological assessment may be warranted.

It is important to stress that individuals requesting accommodation because of a psychiatric disability should have been previously diagnosed as having that disability. Diagnoses made only at the time when accommodations have been requested may be viewed with suspicion as potentially self-serving.

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[3] R.L. SPITZER, J.B.W. WILLIAMS, M. GIBBON, & M.B. FIRST, STRUCTURED CLINICAL INTERVIEW (Biometrics Research Department, New York State Psychiatric Institute 1989).

Disorders

The SCID diagnoses Affective or Mood Disorders, Anxiety Disorders, Psychotic Disorders, Psychoactive Substance Use Disorders, Somatoform Disorders, Eating Disorders, and Adjustment Disorders. Each is reviewed below.

Affective or Mood Disorders

The Mood Disorders consist of a collection of related disorders that have in common a disturbance of affect or emotion as a predominant feature. In other words, the problem is largely one of emotional regulation and is what is commonly meant by depression and manic depression. The DSM-IV divides Mood Disorders into three general categories: Depressive Disorders (Unipolar), Manic-Depression (Bipolar), and two disorders based on their cause (Mood Disorder Due to a General Medical Condition and Substance-induced Mood Disorder). Furthermore, Depressive Disorders are themselves divided into Major Depressive Disorder, Dysthymic Disorder, and Depressive Disorder Not Otherwise Specified. In this chapter, Adjustment Disorder with Depressed Mood also is described because it is quite common. The Bipolar Disorders are divided into Bipolar Disorder, Cyclothymic Disorder, and Bipolar Disorder Not Otherwise Specified. Before mood problems can truly be classified as a disorder, there must be one or more episodes lasting one to two weeks or even more. Everyone feels "down in the dumps" on occasion but it is the severity and recurrence that distinguish Mood Disorders from episodes of common human sadness. Indeed, periodic depression of a mild sort is called, "the common cold of mental health." Most people get it on occasion and it is typically self-limiting.

Major Depressive Disorder

This is characterized by one or more major depressive episodes without complications due to other disorders. The symptoms are a depressed mood most of the day, or nearly every day, diminished interest or pleasure in most activities, significant weight and/or appetite loss or gain, insomnia, motor agitation or retardation, loss of energy, feelings of worthlessness, less ability to think or concentrate, indecisiveness, and recurrent thoughts of death or suicide. Of course, few individuals will experience all of the above symptoms, but generally five or more will be present to a certain extent. These symptoms are not typically caused by ordinary losses such as the death of a loved one. Normal losses often result in a depressed mood for a while but, if it persists, it may indicate the presence of a depressive episode or disorder.

Women, for reasons that are not entirely understood, exhibit depression at a rate twice that of men. It can begin at any age but the average onset age is the mid-20s and is dropping. The more major depressive episodes an individual has, the more likely it is that future episodes will occur; 50-60% for a second episode to 90% for a fourth. There is a high mortality associated with major depression and about 15% commit suicide with a four-fold death increase past fifty-five years old. There appears to be a biological component in that it is considerably more common among close relatives of depressed people than among the general population.

It is easy to misdiagnose major depression as simply a part of normal developmental stages, such as adolescence or old age. Sometimes school personnel assume that all adolescents are depressed; it's just part of growing up. Certainly, adolescents have at least their share of mood swings. However, if a depressed mood persists or seems severe, the individual should be referred to a mental health professional such as a psychiatrist or psychologist for an examination and diagnosis. This is especially important because of the increased risk of suicide.

Dysthymic Disorder

This is a mild form of depression that occurs most of the time for at least two years. People with Dysthymia are viewed by themselves and others as chronically "down," lacking in self-esteem, having low energy, frequently complaining of being tired, feeling inadequate, and lacking interest in activities. Because these symptoms are chronic and relatively mild, they may go unnoticed. The individual may report, "I've always been this way" and others who know him or her are likely to agree. While Dysthymia is equally likely among boys as girls, adult women are two to three times more likely to be dysthymic than men. Like major depression, it appears to have a biological component.

Dysthymia often results in poor academic performance as well as interpersonal problems. Persons with this disorder are often irritable as well as depressed and tend to lack social skills. This may result in a vicious circle as the depressed irritability and lack of social skills leads to a progressive withdrawal from and by others which further exacerbates the mood problems and the poor social skills. It is possible that "loners" who are at increased risk for violent behavior may suffer from Dysthymia. It is even more likely to be misdiagnosed than major depression because it appears to be simply a personality style.

Depressive Disorder Not Otherwise Specified

This is essentially a "catch-all" category for disorders that do not meet the criteria for other depressive disorders. For example, there might not be enough symptoms present to qualify as a major depression. The depressive episode may be too brief even though it is recurrent or it might be superimposed on another, more serious disorder. It might be part of a Premenstrual Disorder. Regardless of these conditions, however, the individual is clearly suffering from a disorder, not just being difficult or cranky, and it is important that it be fully and competently diagnosed.

Adjustment Disorder with Depressed Mood

The Depressive Disorders discussed so far generally occur in the absence of a clear causal agent. It is difficult for the individual to say *why* he or she is depressed and others who know them usually can't either. An Adjustment Disorder, however, occurs in response to an identifiable psychosocial stressor or stressors; that is, the disorder occurs within three months of an environmental event such as death of a parent or spouse, loss of a job, or being suspended from school or college. The stressors also may be on-going; for example, living in a poor neighborhood or a dysfunctional family. However, to meet the criteria for an Adjustment Disorder, the reaction must significantly exceed what would usually be expected in response to the stressor and must result in a significant impairment of functioning. All people must periodically cope with losses and problems in their lives but those with Adjustment Disorders exhibit more than what would be considered a normal reaction. Adjustment Disorders may include a number of symptoms; here the primary symptom is depression. In others, it might be anxiety, anxiety and depression, or a Conduct Disorder. Once the stressor has been removed, the disorder by definition terminates in six months or less.

Adjustment Disorders are quite common in our society. In many instances, removing the stressor or cause also removes the symptoms. However, unusually vulnerable people may not react that way and it is sometimes difficult or impossible to remove the stressor. A dead parent cannot, for example, be returned to life. In these cases, it is important to institute psychological or psychiatric interventions to increase the likelihood of the individual returning to an earlier state. Adjustment Disorders frequently result in a decline in academic work and/or poorer social relations. An untreated Adjustment Disorder with Depressed Mood may result in a major depressive episode or disorder.

Bipolar Disorder

This is what is commonly described as Manic-Depression and is characterized by mood swings between mania and depression. The swings may be high or low, long or short. While in a depressive state, people exhibit the symptoms described earlier for major depression. While in a manic state, however, they are overly energetic, overly optimistic, possess inflated self-esteem, are very distractible, and very agitated. Moreover, they may be angry and irritable, or make poor judgments about their activities, which often result in inappropriate purchases or business decisions. Unlike more normal energetic people, they are unable to concentrate or focus on one task for any length of time. Therefore, they often accomplish little or nothing despite their high energy level, although they may on occasion demonstrate extraordinary creativity. When the manic phase ends, as it invariably does, they "crash" into depression.

Unlike depression, which is mostly psychological with a biological component, Bipolar Disorders are thought by many to be purely medical disorders and typically (about 70%) respond well to medication. Psychological interventions are mostly used to help individuals manage their medication.

Cyclothymic Disorder

Cyclothymia is a chronic, fluctuating mood disturbance in which neither the periods of mania nor the periods of depression are sufficient in severity, pervasiveness, or duration to meet the criteria for a manic or a depressive episode. This diagnosis is used only if, in the past two years, the individual has not had instances of major depression, mania, or mixed episodes of both. These people have mood swings that, while not severe enough to cause major disruptions in functioning or to require hospitalization, are nevertheless severe enough to cause significant distress or to impair functioning in one or more areas of life. Chemical Substance Disorders and Sleep Disorders also may be associated with Cyclothymia. Occasionally, however, the periods of hypomania may result in enhanced functioning. People with Cyclothymic Disorder may be seen as volatile, unpredictable, moody, irritable, and/or inconsistent. This disorder gradually shades off into more normal behavior with mood volatility and it may be difficult to determine on occasions when a true disorder is present. Even some normal individuals seem to have more mood swings than others and may be described as temperamental or "high strung."

Bipolar Disorder Not Otherwise Specified

This is a category that includes disorders with bipolar features that do not meet sufficient criteria for any specific disorder. For example, there may be rapid mood cycling without minimal duration criteria or recurrent hypomanic episodes without corresponding depressive episodes. Or, bipolar features might be present but it is not possible to determine if they have other causes, such as a medical condition or the use of chemical substances.

In addition to these Mood Disorders, there are some that are known to be caused by a general medical condition or the use of chemical substances. The behavioral features may closely resemble the disorders previously described so it is important that a medical history and evaluation be performed as well as obtaining a history of drug use. Because of the ubiquitous presence of drugs in contemporary American society, it is recommended that drug usage be assessed routinely in all cases where significant mood changes are of fairly recent origin. Many problems ascribed to the storms and stresses of youth may in fact be due to drugs.

Mood Disorders are very common emotional problems among all levels of society. They are quite treatable, either by appropriate medication, psychotherapy, or a combination of both, but often are ignored or misdiagnosed, especially among youth and the elderly.

Recommendations for reasonable accommodations

The symptoms associated with a Mood Disorder can interfere with a person's academic performance to a significant degree. Because cognitive functioning, concentration, and stamina are impaired, a student may find that it takes much longer to study or complete assignments. They may not be able to carry a full course load or take a lengthy exam all at once. The irregular or fluctuating nature of some disorders, such as Cyclothymic or Bipolar Disorders, also can be disruptive for the student. They may miss classes or be unable to study during a period of relapse, hospitalization, or medication adjustment. In addition, some medications used to treat Mood Disorders may produce side effects such as drowsiness, tremors, restlessness, or dry mouth, which can be a problem in classroom or testing situations. Depending on the circumstances, the following accommodations might be appropriate and reasonable for students with these disorders:

(1) Adjusted course load: Permit students to enroll part-time or take a reduced course load without penalty. If students experience a relapse or crisis period due to the disorder, and are unable to complete a course, consider allowing a medical withdrawal, incomplete, or extension.

(2) Early registration and early syllabus: Registering early allows students greater flexibility to design a class schedule that meets their needs (build in breaks, avoid extended class periods, avoid morning classes). Receiving a syllabus prior to the beginning of classes allows students time to prepare for a class and arrange needed assistance.

(3) In-class modifications: Depending on the specific symptoms, modifications may include pre-arranged breaks during long classes; permitting students to tape record lectures or receive copies of class notes; or permitting beverages in class.

(4) Alternative testing arrangements: Permit extended time for in-class quizzes or exams. If a test is particularly lengthy, it may be appropriate to allow the student to take it in segments, or to take breaks.

(5) Access to support services: Students should have access to disability specialists, counselors, or other qualified persons who have knowledge of their respective disabilities and can act as an advocate and a liaison with others on campus. This contact person may help the student arrange accommodations, work out problems, provide referrals to campus and community services, and communicate with faculty or staff.

Anxiety Disorders

Anxiety has been described as the disorder of the modern age.[4] Choices—occupational and social—that must be made by young people today are much greater and more numerous than those in previous generations and the risk of making inappropriate choices is seen as more serious. Temptations are everywhere and the breakdown of family and community structures has resulted in less assistance from adult support systems in avoiding these temptations or in making appropriate choices. The levels and degree of anxiety experienced by people have correspondingly increased.

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[4] E.T. Dowd, Cognitive Hypnotherapy (Jason Aronson, 2000).

Perhaps because of the ubiquity of anxiety in our culture, there is a large number of Anxiety and Anxiety-related Disorders. The most common ones, including those that are more likely to be found in a college setting, are described below.

Generalized Anxiety Disorder (GAD)

Perhaps no other Anxiety Disorder fits the common public perception of anxiety as this. The central feature of this disorder is excessive anxiety and worry most days over a period of at least six months. People with GAD often find it difficult to concentrate, are restless and easily tired, are irritable, have difficulty concentrating, and are afflicted with sleep disturbances. The anxiety appears to be uncontrollable and pervasive, and interferes significantly with ordinary functioning. Furthermore, the worry and anxiety are out of proportion to what most people would consider appropriate; many who suffer may not even know exactly what they are worried about. They often worry about unlikely occurrences and are what we would commonly describe as "worry warts." Indeed, many people diagnosed with GAD report having felt anxious all their lives.

It is quite common for GAD to occur along with Mood Disorders and with Substance-related Disorders. Indeed, one possible reason for substance use or abuse is to reduce anxiety. A significant cause of anxiety appears to be the possibility of evaluation ("performance anxiety") and it is common for those with GAD to worry excessively about their competence or performance, requiring constant reassurance about their adequacy. Persons with GAD also may be excessively conforming, punctual, and obsessed about perfection. High anxiety tends to run in families and more women (55-60%) are diagnosed with GAD than men.

Specific Phobia

Whereas people with Generalized Anxiety Disorder are sometimes uncertain what they are afraid of, and tend to be afraid of many things, with Specific Phobias they know exactly what they fear. Furthermore, they are anxious only when in the presence of or confronted by the specific phobic object or situation. The fear must be of sufficient intensity to significantly and seriously interfere with normal functioning and be markedly distressing to the individual. Phobics recognize that their fear is excessive or unreasonable; if they did not, the disorder would be better classified as delusional. Upon avoidance of the phobic object, the fear diminishes rapidly. But individuals forced to remain in the presence of the phobic object may develop a full panic attack, with muscular tremors and weakness, heart palpitations, fainting, and the like.

Circumscribed fears are quite common but normally the intensity does not reach a level sufficient to be classified as a phobia. Test-phobic students, for example, would be completely unable to function in a test-taking situation, not simply handicapped or anxious. The specific phobic object can vary widely, from animals to social situations (in which case it is classified as a social phobia), to situations such as riding in an elevator or a car. In some subcultures, idiosyncratic phobias such as fear of evil spirits or demons might occur.

Social Phobia

The essential feature of this disorder is a strong and persistent fear of social or performance situations in which embarrassment is a possibility. Individuals with this disorder often are afraid that others will judge them as being "crazy," weak, stupid, or just plain anxious. Public speaking may be especially feared because they are afraid that others will notice that they are inarticulate or that their hands shake and their voice trembles. In addition, the phobia must be of sufficient intensity to markedly interfere with the person's life and must qualify as excessive or unreasonable. In fact, the diagnosis of Social Phobia is not made if the fear is reasonable (e.g., responding in class when unprepared).

Panic Disorder

This diagnosis is made if there have been recurrent and unexpected panic attacks with at least one month of persistent concern about future panic attacks. There are thirteen specific symptoms of panic attacks (e.g., heart palpitations, chest pains, feeling dizzy or unsteady, losing control), of which at least four must be present. Panic attacks occur with or without Agoraphobia (fear of going out in public, literally "fear of the marketplace"). Panic attacks occur with Agoraphobia when people fear that help might not be available to them in a public space in the event of a panic attack. Agoraphobia tends to be progressive, in that the individual avoids more and more situations, eventually being confined to his or her home.

Individuals with panic attacks commonly report fears of having a heart attack, of "going crazy," fainting, or losing control of themselves. Past behavior is not comforting to them; even though they have never actually fainted in a public place, "there is always next time!" The only way for the panic to diminish is for them to leave the situation although there may not necessarily be a specific situation acting as a trigger. Therefore, panic attacks often are unexpected; indeed, that is a requirement for a diagnosis of Panic Disorder. These panic attacks gradually diminish although during their occurrence the individual thinks they never will. But they always do.

Panic attacks can be triggered or exacerbated by interpersonal losses or disruptions, such as the death of a parent or parental divorce in children or the death or divorce of a spouse in adults. These losses seem to trigger an increased sense of personal vulnerability so that the individual fears losing or being out of control. Major Depressive Disorder also occurs in at least half the cases of Panic Disorder and either disorder may occur first. Other Anxiety Disorders also may be present. There often is significant "secondary gain" present (i.e., individuals with Panic Disorder may gain something from their problem). The secondary gain might be excusal from required activities (e.g., course requirements) or additional care taking by other people. Although the secondary gain may be a conscious strategy, often it is not. Anxious avoidance behavior becomes reinforced over time.

Obsessive-compulsive Disorder (OCD)

This disorder may involve obsessions, compulsions, or both. Obsessions are recurrent and unwanted thoughts that dominate the mind while compulsions are ritualized and stereotyped behaviors that are repeatedly performed. Both are recognized as inappropriate, alien to the self, and out of control and both cause significant distress.

The most common obsessions concern contamination (e.g., becoming infected by shaking hands with someone), repeated doubts (have I left the stove on at home?), need for specific forms of order (e.g., books must be arranged in a certain way on one's shelves), aggressive impulses (e.g., thoughts of shouting an obscenity in church), or pornographic sexual imagery. These obsessions can arouse a great deal of anxiety.

Compulsions are repetitive behaviors that reduce the anxiety associated with the obsessions or to prevent some terrible situation from occurring. For example, the anxiety generated by obsessive thoughts about leaving the stove on or the door unlocked may only be reduced by returning repeatedly to one's house and checking the stove, the door, and perhaps other things. Anxious obsessions about contamination may be reduced by repeated hand washing, often to the point of skin damage. Other compulsions may involve repeated invocation of prayers to overcome blasphemous thoughts, compulsive counting (perhaps ten times backwards and forwards), or performing rigid behaviors according to certain rules.

Both obsessions and compulsions are recognized by adults as excessive and inappropriate (although not necessarily at the time of contact). Attempts tc control the obsessions or to suppress the compulsive behaviors result in mounting, often massive, anxiety. Only the performance of the behavior affords relief and then only temporarily. There appears to be a partial genetic basis for this disorder because it is more common for twins and first degree biological relatives of a person with OCD than for the general population.

The reader can probably see that a certain degree of obsessive-compulsive tendencies may actually be helpful for high accomplishment, especially in fields that require the performance of detailed, accurate work, and many high achieving individuals have certain obsessive-compulsive tendencies. However, the disorder interferes with functioning, rather than assisting it, and causes significant distress. Much time is generally required for the performance of compulsive rituals. In addition, they exceed what is considered to be ordinary careful behavior and the obsessive thoughts have an intrusive quality.

Posttraumatic Stress Disorder (PTSD)

This disorder has recently had an increased prominence in American society. It was originally developed to describe extreme stress reactions under wartime conditions, most recently the Vietnam War, and was formerly known as "battle fatigue" or "shell shock." It has now been expanded to include extreme anxiety reactions due to a number of different stressors, such as violent personal assaults (rape, mugging), terrorist attacks (e.g., World Trade Center), kidnapping and other hostage situations, natural disasters, and the like. Symptoms can include recurrent and intrusive distressing recollections or dreams ("flashbacks") of the event, especially when triggering events (anniversaries, pictures) are present, a feeling of reliving the event, emotional numbness and detachment as well as a restriction of the typical range of feelings, repression of certain aspects of the experience (though not for the entire experience), efforts to avoid reminders of the traumatic event, occasional feelings of depersonalization, hypervigilance, difficulty in concentrating and in falling asleep, and an exaggerated startle response. Of these symptoms, the presence of flashbacks is the one most associated in the popular mind with PTSD. The duration of these (or other) symptoms must be more than one month. Posttraumatic Stress Disorder causes significant emotional distress and considerable impairment in one or most areas of life, often rendering the individual incapable of performing. If the symptom duration has been less than three months, it is considered acute PTSD; if three months or more, chronic PTSD. If the initial onset of the symptoms is at least six months after the traumatic event, it is considered to be delayed onset.

Unfortunately, PTSD has sometimes been used as a "catch-all" category for any emotional reaction due to a stressful event, regardless of degree. Events resulting in Posttraumatic Stress Disorder are *not* the stuff of ordinary human activities. Because of the unfortunate tendency of some individuals to use this label as an excuse for inadequate performance, it is important to conduct a comprehensive psychological or psychiatric examination where claims of PTSD are made.

A related diagnosis is Acute Stress Disorder where these symptoms occur within one month of an extreme stressor. These symptoms are experienced either during or immediately after the traumatic event, persist for at least two days, and are resolved within four weeks. If they are not resolved at that time, the diagnosis of PTSD may be warranted if the criteria are met.

Recommendations for reasonable accommodations

The emotional and physical symptoms associated with the various Anxiety Disorders can significantly impair a student's ability to pay attention in class, complete assignments, or perform on tests. In the case of extreme phobias they may even prevent a student from making it to the classroom. Certain modifications or accommodations may be necessary to help such a student gain access to an education. Accommodations should be aimed at reducing unnecessary stress and minimizing contact with anxiety-provoking situations or stimuli, and include the following:

(1) Adjusted course load: Where appropriate, permit students to enroll part-time or take a reduced course load without penalty. If students experience a relapse or crisis period due to the disorder, and are unable to complete a course, consider allowing a medical withdrawal, incomplete, or extension.

(2) In-class modifications: Depending on specific symptoms, these modifications might include seating arrangements that reduce anxiety or distraction (near the door or in front); permission to take breaks to relieve anxiety; permission to bring a friend or "safe" person to class; permission to tape record lectures or receive copies of class notes; where realistic and feasible in extreme cases of phobias, OCD, or panic attacks, use of a distance learning format should be considered (for example, complete course requirements off-campus via videotaped lectures and computers)—this would not be appropriate if attendance/participation were essential elements of the course, or undue hardship on the college would result.

(3) Alternative testing arrangements: Allow extended time for tests or exams; provide a distraction-reduced, private test area; permit breaks during testing to relieve anxiety; in cases of severe test anxiety, alternative formats (reading the test aloud, individual proctoring) may be permitted.

(4) Access to safe zone: Allow students to have access to an office, lounge, or other designated area where they can go if they have a panic attack.

(5) Access to support services: Students should have access to a disability specialist, counselor, or other qualified person who has knowledge of their respective disabilities. This contact person may help the students arrange accommodations, work out problems, provide referral to campus or community services, and communicate with faculty and staff.

Substance-related Disorders

For a variety of reasons, the use and abuse of chemical substances has become a major problem in contemporary American and Western European societies, including colleges and universities. In addition, whereas previous substance abuse was typically confined to a single substance, today's addicts are much more likely to be poly-substance abusers.[5] Substance abuse was initially attributed to moral weakness and later, because of the influence of Alcoholics Anonymous and its spin-offs, to disease processes.[6] There are signs, however, that the moral failing model might be re-establishing itself. While the causes and effects of the different chemicals vary considerably, there are many commonalities as well. It is beyond the scope of this chapter to describe the effects of all the different substances. Instead, the commonalities in conceptualization and symptomatology will be reviewed.

There are two broad classes of Substance-related Disorders. The first is Substance Use Disorders and includes Substance Dependence and Substance Abuse. The second is Substance-induced Disorders and includes a variety of other disorders that are caused by substance use.

Substance Dependence

This diagnosis is indicated when there is a continued pattern of repeated substance use that results in compulsive use, increased tolerance for the drug, and withdrawal problems. The diagnosis can be applied to every drug except caffeine. The individual requires more and more of the substance to achieve the desired effect, although both tolerance and withdrawal effects vary considerably across drugs. If the drug is not administered, cravings result. There are usually persistent and unsuccessful attempts to reduce or eliminate the substance and other life activities are generally impaired. For example, one may "swear off" of alcohol one day yet resume its use the next, regardless of the negative effects on family and occupation. The individual may withdraw from family and friends and spend more time in the company of other substance users. Increasing time is spent obtaining and using the substance and less time is spent in other activities. The most important issue is not the problem *per se* but rather the failure to abstain in the face of evidence of the difficulties (e.g., physical, social, occupational) the substance is causing. The usage is out of control although the individual can sometimes continue to function reasonably satisfactorily, at least in certain areas of life activities. It can occur with or without physiological dependence. Substance dependence tends to initially occur in the 20s, 30s, and 40s.

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[5] R.A. McCormick, E.T. Dowd, S. Quirk, & J.H. Zerarra, J.H., *The Relationship of NEO-PI Performance to Coping Styles, Patterns of Use, and Triggers for Use Among Substance Abusers*, 23 ADDICTIVE BEHAVIORS 497 (1998).

[6] E.T. DOWD & L.R. RUGLE, *Substance Abuse in American Society*, in COMPARATIVE TREATMENTS OF SUBSTANCE ABUSE (E.T. Dowd & L.R. Rugle eds., Springer, 1999).

Substance Abuse

This diagnosis is appropriate when there are significant adverse consequences to the repeated drug use. The individual may experience legal, social, and interpersonal problems and repeatedly fail to fulfill important obligations during the same twelve-month period. For example, a person may be repeatedly arrested for disorderly conduct or driving while drunk and yet continue to drink. Another may be repeatedly fired from jobs and yet continue to use drugs. The difference between this diagnosis and Substance Dependence is that Substance Abuse does not include tolerance, withdrawal, or a pattern of compulsive use, but only the harmful consequences of the abuse. It is possible to show features of Substance Abuse without exhibiting evidence of Substance Dependence. This diagnosis does not apply to caffeine or nicotine. Individuals between the ages of eighteen and twenty-four tend to show especially high use of almost all substances and it is more common in men than in women.

The Substance-induced Disorders consist of problems whose symptoms are caused by the recent ingestion of one or more substances. In *substance intoxication*, the individual shows substance-specific symptoms, such as slurred speech, impaired judgment, and aggressiveness, that appear during or shortly after ingestion of the substance(s). In *substance withdrawal*, symptoms of substance-specific distress and impairment, such as delirium tremens, appear shortly after cessation of substance use. Features of acute intoxication and withdrawal are familiar to all of us from the popular media.

There also is a group of Substance-induced Disorders that result in symptoms characteristic of other disorders. These include: Substance-induced Delirium, Substance-induced Persisting Dementia, Substance-induced Persisting Amnesiac Disorder, Substance-induced Psychotic Disorder, Substance-induced Mood Disorder, Substance-induced Anxiety Disorder, Substance-induced Sexual Dysfunction, and Substance-induced Sleep Disorder. Because the symptoms usually are similar to the primary symptoms of these disorders, a careful psychological diagnosis is needed to determine causality. In general, it is important to rule out the use of chemical substances as a causal agent before diagnosing an individual with these disorders.

Recommendations for reasonable accommodations

Before discussing reasonable accommodations for Substance-related Disorders, it is necessary to clarify the extent to which these disorders are or are not protected under the law. Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 protect the rights of qualified individuals with Substance-related Disorders only if they are not currently using illegal drugs, are no longer engaging in drug or alcohol abuse, or are currently participating in/have successfully completed a rehabilitation program. Educational institutions are not obligated to provide accommodations to persons whose problems result from current abuse of drugs or alcohol, nor are they required to tolerate behavior that violates university rules, regulations, or codes of conduct. Therefore, academic adjustments would only be appropriate in a limited number of situations. An example would be a student who is admitted to a drug rehabilitation program during the semester and, as a result, is unable to keep up with course work. This student might be allowed to take a medical withdrawal, drop to a reduced course load, or receive extensions on assignments rather than be automatically failed. Another example might involve a student who has persistent neurological deficits or brain damage as a result of a prior Substance Disorder. Short-term memory problems, distractibility, difficulty with attention and concentration, as well as other problems can result from drug use or prolonged alcohol use. A comprehensive neurological assessment would be needed to determine the individual's functional limitations. Depending on the student's symptoms, reasonable accommodations may be similar to those provided to students with Learning Disorders or traumatic brain injuries.

Learning Disorders

For generations, teachers have noted on students' report cards, "Not working up to capacity." While that description often may have been made gratuitously as a comment on perceived lack of effort, individuals with this disorder truly are not. This diagnosis is appropriate when one's achievement on standardized tests or classroom performance is substantially below that expected for one's age, intelligence, or schooling. *Substantially below* is generally defined as at least two standard deviations (occasionally less) below expected accomplishment. While these disorders begin in childhood, they may persist into adulthood, and are associated with low self-esteem, social skills deficits, and a higher school drop-out rate. Other disorders, such as Conduct Disorder, Oppositional Defiant Disorder, Attention-deficit Hyperactivity Disorder (ADHD), Major Depressive Disorder, or Dysthymic Disorder are associated with learning disabilities, and it can be difficult to untangle the chain of causation. Individuals with learning disabilities may have either problems in cognitive processing, or a variety of medical conditions. Psychoeducational, neurological, or cognitive processing testing may be necessary to separate those with a true Learning Disability from those who are lazy or who have other disorders. Unfortunately, the label has sometimes been used as a "catch-all" for "slow" children, regardless of the reason.

There is a danger that some people who do not work as hard as others may try to use a Learning Disability diagnosis as a self-serving label to obtain special privileges. Ruth Shalit has pointed out the difficulty of defining a Learning Disability (and conflicting opinion as to whether it even exists neurologically), the fuzziness of the disability laws, and some legal opinion indicating that those not performing at a level commensurate with their abilities may be considered by definition to be learning disabled.[7]

She describes some lurid court cases and notes that, recently, the number of individuals diagnosed as "learning disabled" has greatly increased. Some of these "neo-disabilities," she says, include Dyscalculia (difficulty with calculating numbers), Oppositional Defiant Disorder (a pattern of hostile and defiant behavior), Dysphasia (difficulty in speaking), Dyssemia (difficulty in using signals and social cues, perhaps leading to boorish behavior), and Dysrationalia (difficulty in rational thinking and behavior). At least some of these disorders appear to be new names for old negative behaviors once thought to be indicative of inadequately socialized and parented children. Shalit goes on to state that this diagnosis can lead to special privileges, such as untimed tests, which can raise an individual's grade or score markedly.

Reading Disorder

Individuals diagnosed with Reading Disorder are substantially below expected performance in reading accuracy, speed, and comprehension, and this deficit significantly interferes with academics or other activities. For example, some with a Reading Disorder may reverse letters or numerical digits (Dyslexia) while others may read slowly or not remember what they read. It is more frequently diagnosed in males (60%-80%) than in females, although this could be true partly because the former more commonly exhibit associated disruptive behaviors.

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[7] DEFINING DISABILITY DOWN, (1997).

Mathematics Disorder

In those with this disorder, mathematical performance is substantially below that which is expected. Different skills may be involved—understanding, perceptual, attentional, and operational skills. For example, they may have difficulty learning and carrying out mathematical operations or in turning written problems into mathematical symbols. "Math phobia" is quite commonly observed among college students, and this might be one reason.

Disorder of Written Expression

In those with this disorder, writing skills are substantially below that which is expected. Persons with this disorder commit numerous grammatical or punctuation errors, have poor organization of sentences and paragraphs, and/or have poor handwriting. This is not simply the result of poor schooling because the diagnosis is not given if there are only spelling errors or poor handwriting; there must be multiple and pervasive deficits. Although it begins in childhood, it may be seen in late adolescents and adults. It is not as well specified as other Learning Disorders because many studies do not carefully differentiate among different learning disabilities.

Recommendations for reasonable accommodations

Reasonable accommodations for students with Learning Disorders need to be based on the specific limitations these students experience which pose a significant impairment to the learning process. Such limitations must be determined through a comprehensive psychoeducational assessment. Accommodations should compensate for the specific limitations by providing alternative ways for students to access, as well as to demonstrate their mastery of, required course material. The following are examples of the types of accommodations that may be appropriate, given the student's specific limitations.

(1) Early registration and early syllabus: This allows students time to prepare for courses, set up accommodations, and arrange for help with organizing class materials, planning study strategies, finding tutors, etc.

(2) Access to class notes: In order to supplement their own notes, students may be permitted to receive copies of a classmate's notes, copies of instructor's lecture notes, or in some cases, use of a notetaker. Photocopies of transparencies, charts, or important visual aids should be provided, and important instructions or changes to the syllabus should be given in writing as well as orally.

(3) In-class modifications: Depending upon specific limitations, related accommodations may include permitting students to tape record class lectures; taped texts or alternative text format for Reading Disorders; use of computer or word processor for assignments; use of spell check or no penalty for spelling errors unless spelling is an essential part of the course.

(4) Alternative testing arrangements: These include allowing the student to take exams in a supervised, distraction-reduced space, allowing extended time for exams, and permitting the use of computers, tape recorders, readers, or other auxiliary aids.

(5) Access to support services: Students should have access to a disability specialist, counselor, or other qualified person who has knowledge of their respective disabilities. This person can help with time management and organization; provide direction with registration, financial aid forms, or other complex procedures; give referrals for study skills, tutoring, or other services; and when necessary, act as an advocate for the student.

Personality Disorders

Perhaps no class of Psychiatric Disorders has been as controversial for inclusion as recognized disabilities requiring accommodation as these. As will become apparent, many symptoms of the Personality Disorders have a distinctly negative flavor and those who exhibit them might commonly be referred to as "jerks" or worse. Political commentators have warned of the dire consequences to employers and the nation if people who behave badly are considered to have "disabilities" requiring accommodation. For example, George Will, a columnist, warned that recent interpretations of the Americans with Disabilities Act may require special accommodations to those who may be "a colossally obnoxious jerk on the job."[8] He argued that the symptoms of various Personality Disorders are exhibited by many people and were once thought to be character flaws or personal faults rather than disorders. He noted the legal difficulty of deciding when a particular manifestation was excessive and, therefore, requiring accommodation. Put simply, many of us could probably justify behaving obnoxiously if we thought we could gain special privileges as a result. Indeed, the symptoms of some of the Personality Disorders include taking advantage of situations and people. The outcome, some fear, will be a host of litigants and a precipitous decline in standards of social behavior.

In addition, Personality *Disorders* shade off imperceptibly into personality *styles*, and it can be difficult to determine where a normal style ends and a disorder begins. While all of us could probably identify a number of people who exhibit a few or several Personality Disorder symptoms, that would not mean they have a true disorder. In general, a disorder causes *significant* impairment of functioning whereas a style does not (and may sometimes even be enhancing), but the definition of "significant" can be both psychiatrically and legally elusive. While all of us possess a personality style, most of us do not possess a Personality Disorder. In order to qualify as a Personality Disorder, the pattern of behavior must be pervasive and inflexible across a wide variety of situations and of long duration, going back to childhood or at least adolescence. This criterion also distinguishes a true Personality Disorder from a *personality change due to a general medical condition* or *symptoms that may develop in association with chronic substance use*, in which physiological effects cause marked changes in symptoms characteristic of Personality Disorders. Importantly, there must be significant personal distress or impairment of functioning. In this section, we will describe all of the classified Personality Disorders although not all may require the same degree of accommodation.

Paranoid Personality Disorder

As the popular understanding indicates, this disorder is characterized by a pervasive distrust of other people and their motives, which are generally interpreted as malevolent. These individuals assume, without evidence, that others are deceiving or exploiting them. They may doubt the loyalty of friends or spouses, for example often going to great lengths to "prove" a spouse unfaithful. They may interpret covert insults in most comments, even compliments, and hold grudges for a long time. Indeed, most behaviors or comments by others may be interpreted as validating their suspicious worldview and proving what they already believe. As has been widely noted,[9] if we look hard enough for something, we tend to find it. For example, some individuals may be inclined to see racism or sexism in many social situations. They are uncomfortable with ambiguous situations and may bond primarily with others who share their own simplistic ideas. They tend to blame others for their personal failings. They often are litigious, using the law to right what they consider to be numerous wrongs perpetrated against them. Not surprisingly, they have great difficulty forming strong interpersonal relationships.

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[8] G. Will, *How Ridiculous Does Something Have to be Before It Will be Made Into a Law in America?*, AKRON BEACON JOURNAL, April 4, 1996.

Certain subcultures may view the majority culture with often-justified suspicion, but this should not be diagnosed as Paranoid Personality Disorder. These individuals can generally function very well within their own culture. Some individuals with physical disabilities may display some paranoid symptoms associated with their disability, and this should not be diagnosed. Males are more likely to be diagnosed with this disorder than are females. Between .5% and 2.5% of the general population is afflicted with Paranoid Personality Disorder.

Schizoid Personality Disorder

There are two central features of this disorder—a pervasive pattern of detachment from social relationships and a restricted range of emotional expression in interpersonal settings (flat affect). These individuals truly seem to lack a desire for what others would call normal human intimacy. They have few or no close friendships, tend not to marry, and do not derive much satisfaction from family or friendship relations. They are described as "loners" and often are found in solitary occupations where they can, on occasion, perform brilliantly. They rarely exhibit strong emotions of any kind, either verbally or facially, and are described as cold and aloof. They may tend to react to life circumstances, rather than take direct action, thus giving the impression of "drifting."

Individuals from other cultural backgrounds may display certain schizoid features when placed in a majority culture and this should not be diagnosed. It is slightly more common in males and is uncommon in the population. It tends to run in families.

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[9] E.T. Dowd, Cognitive Hypotherapy (Jason Aronson, 2000).

Schizotypal Personality Disorder

This is similar in many ways to Schizoid Personality Disorder. The major difference is that schizotypal individuals display an eccentricity of behavior and certain cognitive or perceptual distortions. Like the previous disorders, they tend to be loners, have difficulty relating to others, be suspicious, and show a restriction of emotions. However, they also may incorrectly interpret events as having special meaning for them. For example, they may think that an automobile accident was meant to warn them or punish them for something. They may be superstitious and believe in magical thinking (e.g., that they can cause things to happen by thinking about them) and often engage in magical rituals to ward off evil. They may say that they have a "sixth sense" about things and hear familiar voices. Their speech may be rather vague and rambling and may have unusual phraseology. They also may dress in an inappropriate fashion and have difficulty with ordinary social conventions. They strike other people as "odd."

It is important to stress that these eccentricities of behavior and perception are outside the norms of their culture. Certain religious groups hold beliefs (e.g., demon possession) or foster behaviors (e.g., speaking in tongues) that may appear schizotypal to outsiders who do not share the subculture's explanations for phenomena. If the perceptions and behaviors fit the culture, it is not diagnosed. Schizotypal Personality Disorder occurs in about 3% of the population and is slightly more common in males.

Antisocial Personality Disorder

This disorder also has been called Psychopathy, Sociopathy, and Dystocial Personality Disorder. It involves a pervasive pattern of disregard for the rights of others as well as an on-going violation of common social norms. This diagnosis is given only after the age of eighteen, and then only if there have been symptoms of a Conduct Disorder before the age of fifteen. Symptoms of Conduct Disorder include aggression, property destruction, theft, or serious rule violations. Individuals diagnosed with Antisocial Personality Disorder are deceitful and manipulative, irresponsible, irritable, impulsive, and violent. They often are involved in criminal activities, are overrepresented in prisons, and tend to blame others (even their victims) for their problems. They are commonly described as lacking in human empathy and as "amoral." Individuals with this Personality Disorder often display symptoms of anxiety, depression, Substance-related Disorders, and other Personality Disorders. It also is associated with ADHD.

Antisocial Personality Disorder is much more common in men (3%) than in women (1%) and is associated with low socioeconomic status and poor or erratic parenting. There appear to be both biological and environmental causes. There has been some concern expressed that the diagnosis may be inappropriately used in settings (e.g., inner city) where antisocial behavior may be an important and necessary survival strategy. It is different from criminal behavior undertaken in a calculated fashion for personal gain. Most Mafia members, for example, would probably not be so diagnosed.

Borderline Personality Disorder (BPD)

This disorder is less specific in content than the other Personality Disorders and shares features with many.[10] It is marked by a pervasive pattern of unstable emotions, self-concept, and interpersonal relationships, as well as impulsivity. There is a constant concern with real or imagined abandonment, separation from significant others, and interpersonal loss. Individuals with this disorder often engage in extreme behaviors, such as suicidal gestures or self-mutilating (e.g., cutting) to reduce the threat. Their interpersonal relations are characterized by intense positive or negative affect with little middle ground. They either love you or hate you, and it can change daily. They value other people primarily for what can be obtained. There is great instability in their plans as well; they are fervently interested in one thing one day and something else quite different the next. They often have a lack of self-identity; they do not seem to know who they are and may describe themselves as "empty." They are easily bored. An important criterion for diagnosis of BPD is the presence of impulsive self-damaging behavior in at least two areas, such as suicide, gambling, unsafe promiscuous sex, binge eating, or substance abuse.

Many symptoms found in other Personality Disorders also are found in BPD and individuals diagnosed with BPD may meet criteria for another Personality Disorder. It is a heavily female disorder; about 75% are women. Borderline Personality Disorder also is associated with substance abuse. It appears to run in families, being about five times more common among close relatives than in the general population, where its incidence is about 2%.

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[10] A.T. BECK, A. FREEMAN, & ASSOCIATES, COGNITIVE THERAPY OF PERSONALITY DISORDERS (Guilford 1990).

Histrionic Personality Disorder

Individuals with this disorder are characterized by an excessive emotionality and attention-seeking behaviors. They must always be the center of attention and will make strong efforts to attract attention to themselves if they are not. Much of their effort is designed to impress others and they are easily upset by even mild criticism. Their manner of speech and behavior is flamboyant and often provocative and sexually seductive. Their excessive emotionality can be embarrassing to others, for example if they display unusually strong feelings at weddings. But these feelings often appear superficial and can easily be turned off, leading some to wonder if they are acting. And indeed they often appear to be good actors. Despite (or perhaps because of) these tendencies, they may have difficulty establishing good interpersonal relationships, especially with those of the same sex. Their style of speech may be vague and impressionistic (e.g., they may describe someone as "a beautiful person" without being able to provide any data).

The disorder is about as prevalent in men as in women, although the style may vary. In line with the stereotypes, men may brag of their athletic prowess while women may brag of their physical attractiveness. It appears to comprise about 2-3% of the population. It is important to note that many people may display some histrionic symptoms, but only when they are pervasive and the source of much distress is it diagnosed as a disorder.

Narcissistic Personality Disorder

The story of Narcissus is well known in Greek mythology. He was a handsome young man who, seeing his reflection in a stream, fell in love with himself, dove into the water in pursuit of his reflection, and drowned. The disorder is well-named because its central feature is excessive self-love. Narcissistic individuals display a grandiosity, a need for admiration, and a lack of empathy with others that goes back into childhood. They believe it is their due and their right to obtain success, power, and admiration from others—not because they have worked hard to obtain these things but because they are special, unique, beautiful, and/or brilliant. They have a strong sense of entitlement and expect others to defer to them at all times. For example, they are annoyed if they must wait in line like ordinary mortals and are unconcerned about problems their behavior might cause others. Their relationships with others are exploitive and they are only concerned with what their partners can give to them. They tend to be jealous of the success of others, particularly if it has eclipsed theirs, feeling wronged by others or by circumstances. They may be seen by others as snobbish, rude, or patronizing. Ironically, they suffer from low self-esteem which is carefully hidden (even from themselves) by their arrogant attitude.

These features often are characteristic of adolescents (one might say it goes with the territory) but most do not develop a full disorder. Between 50% and 75% are male. However, there have been social critics like Christopher Lasch who have argued that ours is an entire "Culture of Narcissism," caused (among other things) by an overly indulgent and permissive child rearing.[11] Children who are denied nothing, the argument goes, will grow up feeling entitled to everything. Despite this, however, the incidence in the general population of a true disorder is estimated to be less than 1%. While it shares features with the Histrionic Personality Disorder, it is distinguished from it by its grandiosity and entitlement.

Avoidant Personality Disorder

Individuals with this disorder show a pervasive pattern of social inhibition, feelings of inadequacy, and extreme sensitivity to negative evaluation, especially in social situations. Therefore, they avoid people whenever they can. Even positive feelings due to a successful experience are only fleeting—there is always next time. Because they are so sensitive to criticism, they often see it in situations where it is not really present. For example, an avoidant man may interpret a smile from the woman which whom he is talking as, "She's laughing at my ineptness" rather than, "She finds me amusing and scintillating." Unlike schizoids, who really do not like being with people, avoidants desperately want to have good interpersonal relations; they just do not know how or think they do not. Others see them as shy, timid, lonely, and sometimes (unfortunately) aloof. Because of their sensitivity, they do not have a large social network and thus have limited social support in times of need. Understandably, they are reluctant to take interpersonal risks to improve their situation.

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[11] C. LASCH, THE CULTURE OF NARCISSISM (1979).

Individuals from other cultures who are attempting to integrate into another culture, such as immigrants, can show avoidant features but should not be diagnosed as such. Avoidant behavior is especially pronounced with strangers. Children may show age-appropriate avoidant features that, if they persist into adulthood, may become a disorder. The incidence in the general population is between .5% and 1% and it appears to be as likely in men as in women.

Dependent Personality Disorder

Individuals with Dependent Personality Disorder have an excessive need to be taken care of, as well as great difficulty in making ordinary daily decisions. They may, for example, rely on others (usually a parent or a spouse) to tell them what to wear, where to live, what friends to have, etc. They lack the self-confidence to undertake projects independently and rely on others to begin. It is very difficult for them to disagree with others and they may sacrifice their own independence and ideas to avoid giving offense or making others angry. They often feel uncomfortable alone because of their excessive fear of being unable to take care of themselves. They tend to be plagued with self-doubts and seek constant reassurance from others. Their behavior may be seen as "clingy," which can lead others to attempt to pull away, thus leading the dependent person to redouble efforts to remain close. In this way, dependent persons may help create the very situations they fear. Dependent individuals find it very difficult to function outside of an intimate relationship and, when one ends, immediately (and somewhat desperately) seek another. To be alone is what they fear most.

There are cultural features that should be considered when making this diagnosis. Some cultures are characterized by more deference and politeness than others, and this by itself is not indication of a disorder. Also, some dependent behaviors may be exhibited because there are truly no other options. It is important that the individual have a choice. Cultural norms for appropriate behavior also should be considered. The diagnosis should only be used when the behavior is clearly non-normative and there are no other options. It appears that it is equally likely in men and women and occurs more frequently than other Personality Disorders.

Obsessive-compulsive Personality Disorder

The most prominent feature in this disorder is an excessive concern with order, perfection, and control. These individuals follow detailed rules, create extensive lists of correct behavior, constantly check for mistakes, and accept nothing that is not perfect. The result is that they spend an inordinate amount of time on trivial details and accomplish little in the process. Indeed, their need for perfection may result in nothing being done because nothing is ever good enough. They are very uncomfortable "wasting time" and feel they have to be constantly productive. They find it very difficult to delegate because no one can do the job as well or as fast as they can. Neither can they discard anything until it is thoroughly worn out. Leisure activities are carefully organized and approached with the same seriousness as work—perhaps they cannot tell the difference. They often are labelled "workaholics" and easily become exasperated with their own inability to acknowledge the ideas of others. They tend to be controlled in their interpersonal relations and may appear "stiff." They may be overly scrupulous and inflexible about issues of morality and ethics. While they often function well in controlled situations, they have more difficulty when openness and flexibility are called for. Their motto might be, "In control there is safety!"

It can be seen that there are times and situations when these tendencies might be helpful. Some cultures place a premium on a high level of productivity; individuals who are not highly productive do not survive long. Some religions foster an extreme sense of order or rule-following. A disorder is diagnosed only when the behavior causes distress or impairment or is non-normative for the culture. It is twice as prevalent in men than in women and accounts for about 1% of the general population.

Recommendations for reasonable accommodations

While the features associated with Personality Disorders result in significant impairment, distress, and even chaos for a person with this diagnosis, they do not appear to *directly* interfere with the person's academic performance or ability to learn. Personality Disorders do not directly limit a person's ability to read, write, comprehend lectures, study, or take tests. However, individuals with a Personality Disorder do experience significant problems with interpersonal relationships or social interactions, and often have difficulty getting along with others. To the extent that social interaction is part of an academic setting, such individuals may be at a disadvantage because of their disorder. For example, consider individuals with Schizoid, Schizotypal, Paranoid, or Avoidant Personality Disorders who experience extreme social inhibition, lack basic interpersonal skills, and have a profound dread of social interactions. They may be unable to participate in class discussions or work with lab partners or classmates on a group project. Modifications that minimize the need for such interaction may be appropriate, depending on the class and its intended purpose. These could include substituting individual projects, journals, etc. in place of group work. In extreme cases, a student might be permitted a "distance learning" format, where videotaped lectures or interactive computer programs replace class attendance. Obviously, if participation and interpersonal communication are essential elements of the class, or if modifications would substantially alter the program or activity or create an undue burden, such accommodations would not be appropriate. Students with Personality Disorders are likely to encounter problems at some point in their academic career. They should have access to support services for managing these problems, be able to obtain referrals to counseling or other resources, and be given assistance in communicating with faculty, staff, and others.

As noted in the description of these disorders, individuals with certain Personality Disorders may exhibit behaviors that are disrespectful, impulsive, destructive, violent, or even criminal. While such acts may be characteristic of their mental disorder, educational institutions are not obligated to tolerate or accommodate behaviors that violate the institutions rules or conduct codes.

Attention-deficit Hyperactivity Disorder (ADHD)

Psychological disorders often are trendy in nature and, like PTSD, this is a good example. Although it was unknown a number of years ago (at least by this name), it is now quite well known in the popular press and the label is sometimes inappropriately applied to anyone who is unusually active. It is generally considered to be a disorder of childhood and adolescence, and one of the criteria for its diagnosis is that some symptoms were present before seven years of age. However, it often is diagnosed considerably later and it can be a problem throughout life, although its severity tends to diminish with age. Its essential feature is a persistent and pervasive pattern of impulsivity and hyperactivity along with inattention to external stimuli. Individuals with ADHD have difficulty attending to details and maintaining sustained attention to most tasks. They lack organization, have difficulty following through on assignments, and may begin and partially complete a series of tasks without finishing them. They easily lose things and appear disorganized in their work habits. Behaviorally, ADHD may be demonstrated by constant motor behavior, such as fidgeting or squirming, and by a constant flow of verbal behavior. Other people may call them "motor-mouths" and complain they "can't get a word in edgewise." Individuals with ADHD tend to be impatient and frequently interrupt others or intrude upon their work. They often do not seem to hear other people, as if they were lost in their own thoughts. Others may accuse them of "not paying attention." It occurs much more frequently in males than in females (ratio between 4:1 to 9:1), leading to the suspicion that there may be a sex-linked genetic basis to ADHD. Indeed, it has sometimes been referred to as a "condition" rather than a "disorder."

To some extent, this may sound like deliberate behavior and indeed others often attribute it to a lack of caring or concern, wilful disobedience, or even a Conduct Disorder. It also may sound like ordinary behavior of many people—an aspect of the human condition. What sets it apart, however, is that it is developmentally-inappropriate behavior. While many of these symptoms might be expected in young children, they are not appropriate in adults. In addition, to meet diagnostic criteria, the behavior must cause considerable functional impairment in at least two areas of life (e.g., academic, occupational). However, it is unusual for the same level of dysfunction to be present in all settings and these individuals often can function appropriately while under strict control, in a new situation, or where the task is intrinsically interesting to them. The drug *Ritalin* is commonly prescribed for this condition, sometimes for children with a high energy level who place unwanted demands on care-givers or teachers. "Doped-up" children are purportedly easier to handle.

Given the prominence in the popular press of ADHD and its symptoms, it is easy for someone who lacks self-discipline and self-organization or who is simply lazy to claim to have a "disability" and therefore, deserving of special privileges. The problem of separating those with a true disability from those who are self-serving is exacerbated by the fact that there are no laboratory tests that have been shown to be diagnostic of ADHD. Although those with the condition exhibit difficulties with tests requiring effortful processing, it is not clear what the specific cognitive deficit is. Perhaps the clearest differentiating criterion is that some symptoms of impairment must be present before seven years of age. Adults should not be able to claim that they have suddenly discovered they have ADHD when faced with a demanding task.

Recommendations for reasonable accommodations

It is obvious that the symptoms associated with ADHD interfere with the learning process. If a student cannot concentrate during a long lecture, he or she will miss out on important concepts and have incomplete class notes. Similarly, a student who is unusually distracted or restless during an exam may run out of time and perform poorly. The student's distractibility, lack of sustained attention, problems with organization, and hyperactivity represent functional limitations in an academic setting. Reasonable accommodations for students with ADHD should compensate for these limitations by providing alternative ways for students to access, as well as demonstrate their mastery of, required course material. Such modifications are intended to reduce or eliminate any disadvantages that exist as a result of the disorder, not to make up for lack of effort or ability. The following is a list of possible reasonable accommodations for students with ADHD.

(1) Early registration and early syllabus: This allows students time to prepare for courses, set up accommodations, and arrange for help with organizing class materials, planning study strategies, finding tutors, etc. It also provides some flexibility in setting a class schedule to avoid back-to-back classes or extended class periods that require prolonged concentration.

(2) Reduced course load: Students should be permitted to be enrolled part-time or take a reduced course load without penalty.

(3) In-class modifications: Depending upon specific symptoms, related accommodations may include permitting students to tape record class lectures or choose a classroom seat that minimizes distractions and optimizes their ability to attend to the lecture (e.g., in the front of class, or away from a window).

(4) Access to class notes: In order to supplement their own notes, students may be permitted to receive copies of a classmate's notes, copies of the instructor's lecture notes, or in some cases, use of a notetaker. Photocopies of transparencies, charts, or important visual aids should be provided, and important instructions or changes to the syllabus should be available in writing as well as orally.

(5) Alternative testing arrangements: These include allowing the student to take exams in a supervised, distraction-reduced space, allowing extended time for exams, and permitting the use of computers or other auxiliary aids.

(6) Access to support services: Students should have access to a disability specialist, counselor, or other qualified person who has knowledge of their respective disabilities. This person can assist in communicating with faculty and staff; provide direction with registration, financial aid forms, or other complex procedures; provide referral information; and, when necessary, act as an advocate for the student.

Tourette's Disorder

This is a rare condition, occurring only in about four-to-five individuals per 10,000. Its primary feature is multiple motor tics and one or more vocal tics. The types and frequency of these tics can vary considerably, are uncontrollable, and can cause considerable embarrassment and impairment of functioning. The vocal tics may include words such as obscenities, grunts, coughs, or snorts and are very noticeable to others. Motor tics may include touching, squatting, twirling, eye-blinking, and the like. Associated symptoms include obsessions and compulsions, hyperactivity, distractibility, and impulsivity. Not surprisingly, these individuals can be socially anxious and self-conscious. By definition, its onset occurs before eighteen years of age and usually persists for life. There is a significant genetic basis for this disorder.

Recommendations for reasonable accommodations

The unusual behaviors that are a primary feature of Tourette's Disorder can interfere with the learning process in several ways. Gestures and involuntary vocalizations can be distracting to others as well as to the student with this disorder. Motor tics may limit notetaking or writing skills and reduce speed. As mentioned above, these behaviors cause considerable embarrassment and anxiety in which the student may expend more energy on suppressing them than on attending to classwork. However, because tics are involuntary and irresistible, they eventually must be performed. The goal of accommodations should be to create a classroom environment that maximizes the student's ability to focus on learning and minimizes the distractions. Recommended reasonable accommodations may include the following:

(1) Attendance modifications: The student may need permission to leave the classroom or take breaks to relieve tics in private. If the student's tics are particularly disruptive and interfere with other students' learning, alternative arrangements may be necessary. These might include allowing the student to view lectures via videotape or a monitor in a private location.

(2) Auxiliary aids: If tics affect writing, students may need to use a tape recorder or computer for class notes, writing assignments, or exams.

(3) Access to class notes: In order to supplement their own notes, students may be permitted to receive copies of classmates' notes, copies of an instructor's lecture notes, or use a notetaker.

(4) Alternative assignments: Because tics often increase as a result of tension or stress, modifications that reduce stress may be appropriate. Allowing the student to pre-record a presentation on video rather than perform it live in front of the class, or substituting an alternative assignment in place of a presentation should be considered.

(5) Alternative testing arrangements: Permitting the student to take exams in a supervised, private space allows him or her to focus on the test instead of on suppressing tics. Extended time for exams and use of computers or other writing aids should be allowed.

(6) Reduced course load: Students should be permitted to enroll part-time or take a reduced course load without penalty.

(7) Access to support services: Students should have access to a disability specialist, counselor, or other qualified person who has knowledge of their respective disabilities. This contact person can assist with accommodations, provide appropriate referrals and, if necessary, act as an advocate for the student.

It is important to note that there is a difference between the involuntary gestures and verbalizations resulting from Tourette's Disorder, and voluntary or intentional bad behavior. A diagnosis of Tourette's is not an excuse for behavior that violates the institution's rules or breaks the student code of conduct. Such behavior need not be tolerated and is not protected under the law.

Schizophrenia

In many ways, this is not a single disorder at all, but a collection of similar symptoms that may have different causes. There is a wide variety of symptoms and no single symptom is diagnostic. Rather, it is the pattern of symptoms that together result in impaired functioning that is important.

An important set of symptoms are delusions. These are erroneous beliefs that may have several themes. The most common are delusions of persecution, which would be common in Paranoid Schizophrenia. Referential delusions, where individuals believe that events are directed specifically at them, also are common. Delusions can have a bizarre quality to them but *bizarre* is a difficult term to define and can be at least in part culture-specific. Most people would probably say that a belief that one's body was being consumed by ants was delusional. But what about a belief that demons possess one's body? The latter belief has been a consistent part of some religious subgroups.

Hallucinations also are symptoms of Schizophrenia. Auditory hallucinations (e.g., hearing voices) are the most common but there can be others in different sensory modalities. Again, culture plays a part because hallucinations (though not necessarily labeled as such) may be part of some religions.

Disorganized thinking (formerly called "loosening of associations") also is a symptom of Schizophrenia. The individual may move from topic to topic and provide answers that may be only tangentially related to the questions, or be almost incoherent.

Grossly disorganized behavior is another symptom. The individual may dress in a highly unusual manner, display very inappropriate public behavior, appear unpredictably agitated, or exhibit behavior labeled as "silly."

There also are a cluster of symptoms associated with an unresponsiveness to the environment, facially or bodily. Sometimes there is an unwillingness to speak. Schizophrenics appear to be "in a world of their own."

Schizophrenia is now considered to be primarily a biological disorder rather than a psychological one, illustrated by the fact that it is ten times more likely among immediate biological relatives than in the general population. The incidence in the latter group is about .2% to 2%. Without treatment, they are generally unemployable, have limited social relations, and are often hospitalized. With appropriate medication, schizophrenics have been able to lead productive lives, although not usually at pre-illness functioning, and some drugs have unfortunate and noticeable motor side effects. It is not clear if there are gender differences.

Recommendations for reasonable accommodations

In its severe stages, schizophrenia can be quite debilitating. But if medication is effective or the disease goes into remission, a person may be able to fulfill the demands of the student role with appropriate support and accommodations. Students with this disorder may find it difficult to focus attention for long periods of time, screen out extraneous stimuli, maintain stamina, or interact with others. They may, on occasion, experience a relapse or crisis period requiring extended treatment and absences from school. In addition, they may be bothered by side effects of their medication, such as headaches, restlessness, drowsiness, dry mouth, and more. Possible accommodations for students with these functional limitations include:

(1) Adjusted course load: Permit students to enroll part-time or take a reduced course load without penalty. If a student experiences a relapse or crisis period due to the disorder and is unable to complete a course, consider allowing a medical withdrawal, incomplete, or extension.

(2) Early registration and early syllabus: Registering early allows students greater flexibility to design a class schedule that meets their needs (build in breaks, avoid extended class periods, avoid morning classes). Early syllabus allows students time to prepare for a class and arrange needed assistance.

(3) In-class modifications: Depending on the specific symptoms, these may include prearranged breaks during long classes; permitting students to tape record lectures or receive copies of class notes; permitting beverages in class; allowing students to choose a classroom seat that minimizes distractions and optimizes their

ability to attend to lectures (in front of the class, or away from a loud fan, etc.)

(4) Alternative testing arrangements: Permit extended time for in-class quizzes or exams. Provide a distraction-reduced, private test area.

(5) Access to support services: Students should have access to a disability specialist, counselor, or other qualified person who has knowledge of their respective disabilities. This contact person may help the student arrange accommodations, work out problems, provide referrals to campus and community services, and communicate with faculty or staff.

Guidelines for the Practitioner

Mental health disorders represent a partially socially-constructed class of disorders that often differ from normality in degree, not in kind. Because of this lack of conceptual clarity and clear boundaries, these disorders are especially prone to be used as excuses for poor performance rather than truly deserving of special accommodations. However, there are several mental health problems that are, in reality, discrete disorders and do in fact deserve accommodations. Distinguishing the self-serving individual from the disabled is a political and legal problem of the first magnitude. The following guidelines are recommended:

(1) Require documentation from a psychiatrist, psychologist, or other properly credentialed expert.

(2) Review the documentation timely and provide the necessary accommodations and modifications as appropriate.

(3) If the diagnosis or recommendations appear at all questionable, have the in-house expert or a consultant review the materials.

(4) Where disagreement exists, request additional documentation.

(5) Where accommodations are denied, provide at least one administrative appeal. Administrative decisions should be based on current medical and psychological opinion and not on stereotype or prejudice.

(6) Where accommodations are provided, they need to address the limitations posed by the disability and not merely prove helpful or beneficial.

(7) Deal with all students honestly, professionally, and timely.

4

Physical Disabilities, Accommodations, and Access

Although the assessment of physical disabilities can be as complex (if not more complex) as the assessment of mental disabilities, most physically limiting conditions lend themselves to fairly objective measurement, are often visible, and therefore are generally more easily verifiable. As a result, "physical disorders are less apt to provoke the levels of public skepticism so commonly reserved for mental health and learning disorders."[1] Given the thousands of physical impairments that exist, this chapter will review five categories of disorders and five methods of grouping functional impairments, and then identify possible accommodations, given the nature and extent of the disability. Issues related to access also are reviewed in an effort to aid college and university [hereafter referred to as college] administrators in their efforts to make their respective campuses and programs accessible to students with physical disabilities.

Physical Disorders

Physical disorders may be conveniently grouped into five categories: neurologic, musculoskeletal, visual, auditory, and miscellaneous. Some of the more prevalent specific disorders are identified within each listing.

(1) *Neurologic disorders.* Included within this category are traumatic spinal cord injury with resultant paraplegia or quadriplegia, traumatic brain injury (TBI), stroke syndromes, sequelae of cerebral palsy (motor nerve disorder caused by a permanent brain defect or injury at or near birth), multiple sclerosis (MS) (a disease marked by loss of the protective myelin covering of the nerve fibers of the brain and spinal cord), muscular dystrophy (a group of diseases that feature weakness and wasting of skeletal muscles without the breakdown of nerve tissue), other myopathies (disorders of skeletal muscles), and peripheral neuropathy (nerve damage in the automatic nervous system).

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[1] Stanley F. Wainapel, *Physical Disabilities, in* Accommodations in Higher Education Under the Americans with Disabilities Act (ADA), 171 (Michael Gordon & Shelby Keiser, eds., GSI Publications 1998).

(2) *Musculoskeletal disorders.* This group includes rheumatoid arthritis or other arthritic disorders, collagen diseases such as systemic lupus erythematosus (long-term inflammatory disorder), scoliosis (sideways curve of the spine) and other spinal deformities, lower extremity or upper extremity amputation, sequelae of major bone fractures or ligamentous injuries, lower back pain syndrome, cervical spine pain syndrome, and congenital limb deficiencies (present at birth).

(3) *Visual disorders.* Included among these disorders are diabetic retinopathy (broken blood vessels in the retina of the eye), glaucoma (high blood pressure within the eye), cataract-macular degeneration (when the eye lens loses its clearness), retinitis pigmentosa (decay of the retina in both eyes), congenital conditions such as retinopathy of prematurity, strabismus (eyes do not move together or are crossed), and neuro-ophthalmologic sequelae of MS and TBI.

(4) *Auditory disorders.* Included within this group are sensory-neural hearing loss, otosclerosis (abnormal bone formation in the inner ear leading ultimately to deafness), and congenital hearing loss.

(5) *Miscellaneous.* Everything that remains has been included within this final category, including diabetes mellitus (failure of the pancreas to release enough insulin into the body) and its complications, chronic renal or kidney failure, cardiac diseases, pulmonary diseases (e.g., asthma), and gastrointestinal disorders (e.g., irritable bowel syndrome, ulcerative colitis, Crohn's disease).[2]

Being diagnosed as having a physical disorder does not qualify students as "disabled" or make them eligible for services, however. Determinations must be made as to whether the impairment substantially limits a major life activity (see Chapter 1) and whether any reasonable accommodation exists (see Chapter 6) that will permit the students to be otherwise qualified in spite of their disabilities. Additional assessment is needed to address functional impairment.

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[2] *Id.* at 172-173.

Functional Impairment

Among the variety of alternative approaches for assessing the degree of functional impairment and for determining whether an accommodation is needed, the process proposed by Dr. Stanley Wainapel is particularly well suited for related practices in higher education and discussion within this text. His approach separates deficits into five groups: mobility (limited ambulation or joint range of motion); manual dexterity (difficulty using hands for purposeful activities); information retrieval (limitation in receiving data due to sensory or processing deficits); communication (deficits in articulation or expressive language); and endurance (limitations in tolerating activity for appropriate duration due to factors such as fatigue, pain, or medical issues).[3] Each of the five classifications is assessed, in part, through responses to specific questions.[4] With this additional information, physicians and college personnel will be better able to determine the degree to which an impairment is disabling, and the need for and feasibility of accommodations.

Mobility

In an effort to determine the extent of a mobility-type disability and the need for accommodation, physicians and others need to review answers to the following questions: (1) How far can the client comfortably walk without fatigue? (2) What walking devices (e.g., cane, crutches, walkerette) does the client use? (3) Does the client use a wheelchair? If so, in what situations? (4) Can the client climb stairs without assistance? If so, how many flights? (5) What symptoms prevent the client from walking farther? (6) How long does it take the client to walk a distance of one block? and (7) Does movement limitation of any of the client's joints interfere with function? If so, which joint and which function?

Getting from the vehicle to the classroom, library, or other college building; being able to maneuver within a given building; having accessible housing and facilities; and being able to participate in the college's programs and activities will be critical to the person who is limited in mobility. Preferred parking, wide parking spaces, traversable paths, automatic doors, elevators, ramps, and the like can aid in providing access to and within buildings. In addition, further accommodation may be necessary in classrooms. Adjustable chairs and tables, wheelchair-accessible wide isles, or substitution of a table and chair for a traditional student desk may each be appropriate under the right conditions.

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[3] *Id.* at 174-175.

[4] *Id.* at 175-176.

Notwithstanding the above, for some students with mobility impairments it may be that no accommodation is feasible given the extent and nature of the disability and the specific program or task. For example, it would not be possible for most persons with severe mobility impairments to succeed in a traditional nursing program that requires clinical assignments (e.g., emergency room). The program would not be expected to lower its standards or to exempt the student from those tasks requiring mobility, assuming, of course, that such requirements were considered essential to the training program and to later professional practice. However, each person should be assessed individually and each activity should be reviewed closely to identify essential functions that must be performed. What is impossible for one person may be difficult, but feasible, for another.

Manual Dexterity

When assessing the extent of manual dexterity, responses to the following questions will prove helpful in determining whether the impairment qualifies as a disability and whether accommodations are necessary: (1) Can the client use his or her hands for writing, handling papers, or typing? (2) Does the client use any splints, braces, or similar devices for use of hands? If so, why? (3) Do the client's hands fatigue easily when they are used for writing or typing? If so, after how long? (4) Does the problem with the hands interfere with the legibility of handwriting? and (5) Does the client frequently drop things he or she is holding?

Persons with limited use of their hands may need additional time on tests, notetakers/writers, breaks during tests and other timed assignments, oral testing, use of audio recorders and voice-activated computers, use of "hands free" phones (including voice-activated phone dialers), voice-activated emergency systems, customized toilet and bath accessories, and reachers. As with mobility impairments discussed above, if the use of one's hands is an essential program requirement (e.g., clinical training in dentistry; surgical internship), it may be that no reasonable accommodation exists.

Information Retrieval

In assessing whether a disability exists regarding information retrieval, the following questions should be asked: (1) Is the client's vision adequate to read ordinary newspaper print? (2) Does he or she have difficulty reading or walking in environments with low lighting levels? (3) Does the client have difficulty hearing spoken voices in classrooms or groups of people? (4) Does the client use any special equipment due to vision or hearing loss? If so, what equipment? and (5) Does the client have problems reading despite having normal eyesight? If so, have such problems always existed?

Enlarged print is among the more common forms of accommodation today for persons with vision impairments. This accommodation can be provided both efficiently and in a timely manner due to the use of scanners and word processors. Appropriate print size and type can be produced in a matter of minutes. However, if print size is increased to greater than 24 point, the reader also should be given extra time to complete the task (e.g., a test) as reading speed will be slower. In addition to enlarged print, magnifiers and visual field expanders, talking notetakers and data assistants, video magnification products, screen magnification software, screen reader software, talking clocks and watches, large button reduced glare and/or talking calculators, book markers, and magnifying rulers may prove helpful. Moreover, for those with a severe loss of central visual acuity (e.g., persons with some types of macular degeneration or late stage retinitis pigmentosa), readers, audiotapes, Braille materials and keyboards, computers with optical character recognition, adapted phones (e.g., phones with large numbers and voice prompts; phones that produce an audio of the numbers dialed or announces caller ID), and/or synthetic speech software should be considered.

Furthermore, because persons with saccadic dysfunctions have difficulty keeping their place when reading and writing, they should be allowed to mark their papers instead of placing their answers on a computer-grade sheet. For persons with blurred vision, periodic breaks may allow them to briefly rest their eyes. Other accommodations for persons with focusing problems include the wearing of sunglasses and colored overlays, which help reduce the contrast on the page.

Binocular dysfunctions also can be accommodated for some people simply by occlusion of one eye. With monocular vision, there obviously is no double vision. If this adjustment is insufficient, periodic breaks should be considered. Additional test time generally is not the solution to binocular or focusing difficulties, given that prolonged exposure will exacerbate, rather than lessen, the problem. For extreme cases, the professor might be asked to divide the test into sections and to allow the student to take the test one section at a time over several sittings. This will require additional test days to be established, but the college's SDS unit should be available to monitor the examinations and provide an appropriate test-taking environment. [However, where multiple forms of a test are not available, this option may compromise test integrity—see Chapter 9 on "cheating and plagiarism."]

If the person's vision is severely limited, it once again may mean that accommodation is not possible for certain occupations (e.g., medical training when the ability to independently diagnose and observe is required; surveyor when the ability to see qualifies as an essential function of the job). Do not assume, however, that all individuals are the same or that their ability to adapt is stereotypically limited. It is possible to train and succeed within a wide range of occupations, notwithstanding the fact that the person is vision impaired or even blind.

Persons with auditory deficits also have a wide range of possible accommodations such as hearing aids, amplification systems, and other auditory enhancements. In classroom situations, at times it may prove helpful to use a sign-language interpreter. Most persons with hearing impairments have some degree of hearing and those who are totally deaf often can lip read. Nevertheless, the need for sign-language interpreters will prove necessary in some circumstances.

Similarly, the use of assistive technologies may be necessary to assist persons who are hard of hearing or deaf and include, but are not limited to, TTYs (provides telephone communications without speaking); TDD (provides visual message for phone calls); hearing enhancers; amplified and special telephone equipment, special lavaliere and standard microphones that are received by an FM system; classroom and conference room amplification systems; adapted televisions with closed caption decoders; screen enlargers; alerting and signaling devices (e.g., loud, flashing, strobe); vibrating devices to alert the person to a ring at the door (similar to the vibrating devices provided by restaurants to call waiting customers), a ringing phone, or an emergency; assistive listening devices; clocks and wake-up devices, "bed shakers;" personal emergency response systems; smoke detectors; hearing aids and accessories; auditory trainers (provides a visual signal to the speaker when his or her voice is too loud, soft, or nasal); and signal dogs (alerts to emergency, picks up items, pulls wheelchairs, turns lights on, etc.).

In addition to the above, persons with information retrieval deficits also may benefit from having rooms with adequate illumination, reduced noise, and limited distractions. These accommodations no doubt would benefit all in the class and not just those students with physical impairments that limit retrieval.

Communication

Answers to the following questions will help in determining the need for accommodations when assessing communication deficits: (1) As a result of hearing loss, does the client require an interpreter when speaking with others? and (2) Does the client write or use a computer to facilitate communication with others?

Persons with inadequate communication skills (inability to speak, unclear speech) at times may require assistance from a sign-language interpreter or the use of an adapted computer communication system. The costs of interpreters can be prohibitive and the assignment of interpreters to more than just a few students may prove administratively cumbersome, particularly where demand exceeds the supply of qualified persons. Fortunately, administrators may consider alternative, but effective, accommodations. For example, in courses requiring limited dialogue (e.g., some lab courses) it may be appropriate and efficient to use computer technology that would enable the student to communicate through writing. To expedite the communication from the instructor to the student, technologies might be employed that automatically type out each of the instructor's spoken words. This accommodation may prove inadequate, however, for students who lack the necessary typing skills, who have unclear speech, or are engaged in classes where extensive dialogue occurs. Additional assistive technology devices to assist persons with communications deficits include augmentative communication, amplified speech telephone handsets, anti-stuttering devices, artificial larynx, and speech amplifiers.

Notwithstanding all of the advances in technology, reasonable accommodations may not exist for students with communication deficits wanting to enter "speech intensive" occupations such as foreign language interpreter, speech teacher, or speech therapist, among others. Counselors within SDS should consider the student's abilities, and not just the limitations posed by impairments, along with the essential functions of the training program before providing guidance in the selection of courses or majors or in identifying accommodations and modifications.

Endurance

Answers to the following questions will be helpful in determining whether persons with endurance limitations will quality for protection under federal law: (1) Is the client's sitting tolerance limited? If so, by what? (2) Is the client's writing tolerance limited? If so, how long before rest is needed? (3) Does the client become fatigued during the day so that he or she cannot continue usual activities? If so, when does this occur during the day? (4) Is the fatigue caused by specific environmental factors such as temperature and humidity? (5) Does the client become breathless with only slight activity? and (6) Can the client climb a flight of stairs without being short of breath?

Persons with endurance difficulties can be accommodated by assigning their classes to rooms on the ground level, possibly near exits close to parking; providing them with rest periods during activities or testing; making wheelchairs and scooters available; or maintaining environmental controls for heat and air conditioning. Persons with endurance disorders may find it difficult, or perhaps impossible, to train or participate in a range of physically demanding occupations (e.g., fire fighter, police officer, nurse) and need to consider not only the problems they might face as students, but those they would foreseeably confront as practitioners.

Access

To succeed in higher education, a student must be able to access necessary equipment, resources, and buildings; move within and between facilities; and find adequate housing. Discussions regarding classroom accommodation and modification are unnecessary if students cannot first gain access to the campus and its programs and activities. Accordingly, this portion of the chapter provides discussion regarding transportation, parking, classroom and building access, and housing. A checklist is provided to help college officials in their efforts to comply with federal law and make their programs accessible to the disabled.

Transportation and Parking

Colleges may not discriminate based on disability in the provision of accessible transportation and parking. When a single transportation system is operated by the college, it must be accessible to students with disabilities. In the alternative, when a separate transportation system is provided for students who are wheelchair confined or have severe physical disabilities,[5] its availability (including number of hours in operation) must be comparable to that available to other students. However, colleges can require students to properly document their disabilities (see Chapter 2) and need for specialized transportation, and stipulate that all students must comply with transportation policy (e.g., provide a course schedule by a specified date; provide a timely request for an unscheduled pickup; notify officials that a scheduled pickup will not be necessary). Repeated failure to comply with reasonable regulations can result in the withdrawal of the service. Moreover, the availability of transportation can be restricted for all students to specific times (e.g., 7:00 a.m. to 10:00 p.m.), days of the week (e.g., Monday through Friday), dates (e.g., during the semester, but not during breaks), and destinations or routes (e.g., campus transportation only).[6]

The Eleventh Circuit reviewed a related case, *United States v. Board of Trustees for the University of Alabama,*[7] where a lift-equipped bus operated only four hours per day (10 a.m. to 2 p.m. daily) when regular, but nonaccessible, transportation was available twelve hours per day. In addition, the University was willing to make the one accessible bus available at nonstandard times, but only if given a forty-eight-hour notice. This policy limited spontaneous use of the vehicle. To further complicate the matter, none of the seven vans used for field trips was accessible. Students had to rent accessible vehicles from a commercial agency or the University used the van typically driven during the daily 10-to-2 route, thereby suspending regular transportation for the day. Given the availability variances between accessible and nonaccessible transportation, the need to provide a forty-eight hour notice, and the discriminatory access to vans during field activities, the court determined that the University's transportation services violated section 504. Furthermore, the installation of lifts into three existing vans would cost only $15,000—a cost that would not foreseeably result in undue hardship.

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[5] Northern Illinois Univ., 4 Nat'l Disability L. Rep. 407 (OCR 1993) (finding that the University did not discriminate against a student with vision impairment when it limited access to its intracampus bus service to students with mobility impairments, given that exceptions were made on a case-by-case basis; a regular bus system was available to the plaintiff as well as to all other students who were not found eligible for the special service).

[6] San Francisco State Univ., 2 Nat'l Disability L. Rep. 273 (OCR 1991) (concluding that a University had provided adequate transportation for a student with a disability; the University had limited its services during graduation to transportation from a campus lot to the stadium where commencement took place).

[7] United States v. Board of Trs. for the Univ. of Alabama, 908 F.2d 740 (11th Cir. 1990).

In regard to parking, colleges can require all students, including those with disabilities, who have requested permission to park on campus to register with parking services, pay for a parking permit, and follow parking and traffic rules.[8] If all or a percentage of standard parking is free of charge, so too should parking that is used exclusively by students with disabilities. Furthermore, colleges must comply with federal regulations regarding the number of spaces[9] available for students with disabilities and the size and location of those spaces. One of every eight accessible spaces must be van accessible.[10]

Once a student with a disability exits his or her vehicle, federal regulations require barrier free and accessible paths leading to accessible buildings. Paths[11] from parking spaces to buildings must be in compliance with slope and width requirements and provide for the shortest accessible route.[12] The path must be stable, firm, and slip resistant.[13] Signage should be used to identify accessible routes and entrances. Signage at nonaccessible entrances should identify those that are accessible or, if none, direct the student to locations where information can be obtained about accessible facilities. The international symbol for accessibility must be posted at each accessible entrance.[14]

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[8] Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992) (holding that a student with a disability who had never applied for a free, handicap parking permit lacked standing to bring the action).

[9] University of Massachusetts—Amherst, 4 Nat'l Disability L. Rep. 431 (OCR 1993) (concluding that the University provided too few disability parking spaces and that many of the spaces that were provided were not sufficiently close to the nearest level entrance).

[10] AAGBF 4.1.2(5)(b).

[11] UFAS 4.1.1(2), 4.1.2(1), 4.3.2(2), 4.3.8, 4.4.1. *See also* Burlington Coll., 5 Nat'l Disability L. Rep. 323 (OCR 1994) (finding that the College failed to make its paths, parking, restrooms, and other areas accessible; parking areas and the loading zone of a church leased for graduation also were inaccessible).

[12] UFAS, 4.8.3, 4.3.3. *See also* Nathanson v. Medical Coll. of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991) (denying summary judgment given that issues of material fact existed as to whether the College knew of a student's accident-related back problem and whether it provided reasonable accommodation; the student had requested a straight-back chair and closer parking).

[13] UFAS 4.5.1.

[14] 28 CFR § 35.163(b).

Programs, Classrooms, and Buildings

Although section 504 and the ADA are substantially similar, accessibility requirements differ, particularly between section 504 of the RA and title III of the ADA. Recipients of federal financial assistance must make their programs and activities readily accessible to and useable by persons with disabilities; this may require major structural alterations to existing facilities if access to programs cannot otherwise be achieved. On the other hand, title III of the ADA requires private colleges only to make readily achievable alterations to existing facilities. As a result, access may be limited in private nonrecipient colleges. However, given that all public colleges and nearly all private colleges receive federal financial assistance, this section of the chapter will focus on the "program accessibility" standard rather than the "readily achievable" standard.

Under section 504, recipient colleges are responsible for informing perspective students about their ability to provide accessible programs and activities.[15] Persons with disabilities may not be denied the benefits of, be excluded from, or otherwise be subjected to discrimination because a college's facilities are inaccessible or unusable.[16] However, educational entities are not required to make each of their existing facilities (or even every part of an existing facility[17]) accessible[18] or to destroy the significance of historic property.[19] What is important is that persons with disabilities have access to necessary buildings and be able to participate in the range of programs and activities available at the college.

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[15] Fort Hays State Univ., 4 Nat'l Disability L. Rep. 17 (OCR 1993) (finding that the University had provided adequate notice to persons with disabilities regarding its accessibility).

[16] 34 CFR § 104.21. *See also* Providence Coll., 6 Nat'l Disability L. Rep. 57 (OCR 1994) (finding that the College failed to make its programs, activities, and new construction accessible to and usable by the disabled); University of Nevada at Reno, 5 Nat'l Disability L. Rep. 358 (OCR 1994) (finding many of the University's programs, housing, and facilities to be inaccessible to the disabled); Spoon River Coll., 3 Nat'l Disability L. Rep. 183 (OCR 1992) (finding structural barriers in several facilities that caused programs and activities in those facilities to be inaccessible to persons with disabilities); University of Idaho, 3 Nat'l Disability L. Rep. 168 (OCR 1992) (finding that there were physical barriers to access the swim center and programs held within the center).

[17] Columbus Coll., 1 Nat'l Disability L. Rep. 125 (OCR 1996) (concluding that the College was not responsible for making each part of each facility accessible in order to comply with § 504; the complainant alleged that the College violated federal law by maintaining inaccessible handball and tennis courts); St. Cloud State Univ., 3 Nat'l Disability L. Rep. 118 (OCR 1992) (finding that, although some parts of a building were inaccessible to a complainant with physical disabilities and that there were some problems with scheduling notetakers and in retaining quality sign-language interpreters, the University was in compliance with § 504; moreover, the University was responsive to problems when they occurred).

[18] 28 CFR § 35.150(a)(1).

Colleges can comply with related federal mandates through actions such as the redesign of equipment, the reassignment of classes or other services to accessible buildings,[20] the alteration of existing facilities, and the construction of new facilities. New construction and alteration must be accessible to and usable by individuals with disabilities, to the maximum extent feasible,[21] unless shown to be structurally impractical (e.g., due to the unique characteristics of the terrain).[22] Moreover, changes that are readily achievable should be made, even when more significant alterations are not currently underway, particularly when programs would remain inaccessible without modification. However, structural changes to existing facilities are required only when other methods prove ineffective in achieving compliance.

Courses must be taught in accessible facilities or alternative arrangements must be made, such as provision of the course through videotape, cassettes, or prepared notes.[23] When an alternative arrangement is provided, it must be comparable to that provided for students without disabilities.[24] The availability of library materials,[25] computer centers,[26] water fountains,[27] cafeterias,[28] pools,[29] and restrooms,[30] among others, have been considered by the Office for Civil Rights (OCR) in determining whether a facility is accessible and useable for its intended purpose. However, not all accommodations or modifications requested by persons with disabilities are feasible and some will result in either undue hardship (under section 504) or represent a fundamental alteration to the program (under the ADA).[31]

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[19] 28 CFR § 35.150(a)(2).

[20] San Jose State Univ., 7 Nat'l Disability L. Rep. 281 (OCR 1995) (concluding that programs housed in an inaccessible building were properly relocated to accessible facilities but that the University failed to process a related complaint in a timely manner).

[21] 34 CFR § 104.23; 28 CFR § 36.402(a)(1); 28 CFR § 36.401(a)(1). *See also* Grand Valley State Univ., 12 Nat'l Disability L. Rep. 275 (OCR 1997) (finding that a University failed to make new housing construction accessible to the disabled; by settlement agreement, the University agreed to build additional housing that would be in compliance); Wichita State Univ., 3 Nat'l Disability L. Rep. 306 (OCR 1992) (concluding that the limited alterations that had been accomplished also were not accessible to and usable by persons with disabilities).

[22] 28 C.F.R. § 36.401(c).

[23] University of Massachusetts, 5 Nat'l Disability L. Rep. 322 (OCR 1994) (finding that the counseling center was inaccessible; the University agreed to consider measures that would provide greater access and provided the student with a paging device and fax machine to facilitate her communication); University of Baltimore, 5 Nat'l Disability L. Rep. 115 (OCR 1993) (determining that the University provided alternative methods by which students with vision impairments could gain access to the library and computer room facilities—student volunteers, specialized equipment, voice synthesizers, magnification on some computers, Braille, enlarged type, tutors, notetakers, and tape recorders); St. Cloud State Univ., 3 Nat'l Disability L. Rep. 118 (OCR 1992) (finding that appropriate alternative arrangements had been made for students to receive information that had been provided at inaccessible locations).

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[24] 28 CFR § 36.309.

[25] University of Alaska Fairbanks, 3 Nat'l Disability L. Rep. 268 (OCR 1992) (finding that the University complied with § 504 and the ADA, given that there was an alternative effective method by which students who were speech and hearing impaired could access the library's services); University of Oregon, 3 Nat'l Disability L. Rep. 219 (OCR 1992) (finding that the library was not required to upgrade its CD-ROM system so that the student could independently access information—the information was available to the student with the help of a reference librarian; also, adequate due process was provided the student during the course of the grievance); Kent State Univ., 1 Nat'l Disability L. Rep. 33 (OCR 1990) (finding that when library officials failed to make archive materials available outside the library consistent with University policy, no discrimination or retaliation occurred).

[26] University of Oregon, 3 Nat'l Disability L. Rep. 219 (OCR 1992) (concluding that a student with a visual impairment was not provided access to computer capabilities that were available to other students—upgraded memory on a MacIntosh computer so that the student could use it with the Outspoken screen reading program).

[27] Wichita State Univ., 3 Nat'l Disability L. Rep. 306 (OCR 1992) (concluding that a program was not readily accessible to persons with disabilities, including the complainant, who uses a wheelchair; restrooms, the second floor, water fountains, and telephones were inaccessible).

[28] University of Massachusetts—Amherst, 4 Nat'l Disability L. Rep. 431 (OCR 1993) (concluding that the University violated § 504 and the ADA when it failed to make cafeteria services available to students with mobility impairments); College of Notre Dame, 2 Nat'l Disability L. Rep. 209 (OCR 1991) (determining that the cafeteria was inaccessible given the furniture and doors that were locked; moreover, the College failed to respond promptly to grievances or provide complainants the opportunity to appeal).

[29] University of Idaho, 3 Nat'l Disability L. Rep. 168 (OCR 1992) (concluding that the swim center and men's locker room were inaccessible to a complainant with mobility impairments).

[30] University of Chicago, 3 Nat'l Disability L. Rep. 197 (OCR 1992) (finding that a complainant who was a wheelchair user was denied access to a continuing education program given that there was no usable restroom in the building); Triton Coll., 2 Nat'l Disability L. Rep. 75 (OCR 1991) (finding that a student with anoxic encephalopathy, muscle spasms, and hypothyroidism who was a wheelchair user was denied access to a program given that there was no accessible restroom within the building). *See also* Filardi v. Loyola Univ., No. 97 C 1814, 1998 U.S. Dist. LEXIS 3008 (N.D. Ill. March 11, 1998) (concluding that a plaintiff with quadriplegia and confined to a wheelchair lacked standing when she requested injunctive relief following graduation; she had alleged that the University falsely imprisoned her when she was foreseeably trapped in a washroom but failed to prove the intent to confine; neither negligence nor the knowledge that the facilities were inaccessible was sufficient to render the College liable for false imprisonment).

As colleges determine how best to comply, priority should be given to those methods that will result in the availability of programs and activities in the most integrated setting appropriate.[32] Whatever option is selected, proper emergency signals (visual and auditory) must be in operation.[33] If construction or alteration is necessary, compliance with federal law may be achieved by following guidelines stipulated in either the *Uniform Federal Accessibility Standards*[34] or the *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities*.[35] These publications regulate everything from the ramp[36] leading to the entrance, to the height of the spew of water in accessible fountains.[37]

Housing

Colleges that provide housing to their students without disabilities must provide comparable, accessible housing to students with disabilities.[38] Such housing must be available in sufficient quantity[39] and variety so that the range of living accommodations is, as a whole,[40] similar to that available to others. Often residence halls are inaccessible either because the building lacks accessible entrances or elevators or the bathrooms will not accommodate the needs of wheelchair users.[41] Moreover, notwithstanding possible higher costs associated with the provision of accessible housing, units for the disabled must be made available at the same rate as is charged other students.[42] Concomitantly, if a college assists in making off-campus housing available to its students, it must document that such housing, as a whole, is available to those who are disabled.[43] This requirement is similar to what colleges already are required to do in regard to gender under title IX.[44] Also, colleges may not discriminate against students by failing to assign roommates[45] or in selecting accessible rooms or residence halls.[46]

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[31] Mt. San Antonio Coll., 5 Nat'l Disability L. Rep. 387 (OCR 1994) (ruling for the College in a case where a wheelchair user demanded individual instruction and assistance in a swim class that was designed for group activity and agreeing with the College's position that such an accommodation would represent a fundamental alteration to its program—the College offered other swimming courses and programs that would accommodate his desire to swim).

[32] *See* 34 CFR § 104.22.

[33] North Idaho Coll., 5 Nat'l Disability L. Rep. 484 (OCR 1994) (finding that the College maintained significant barriers to access, that it had not disseminated information as to accessibility, and that it did not maintain a method to warn persons with hearing impairments of fire or other emergencies).

[34] 41 CFR Part 101-19.6, Appendix A.

[35] 28 CFR Part 36, Appendix A.

[36] UFAS, 4.5.1, 4.8.2, & 4.8.5; AAGBF 4.8.2, 4.8.4(2) & (3).

[37] UFAS, 4.15.2, 4.15.3.

[38] *But see* Vassar Coll., 9 Nat'l Disability L. Rep. 41 (OCR 1996) (concluding that there was no § 504 violation when the College conditioned access to housing upon the submission of medical information for a student who had been hospitalized for risk of suicide).

[39] Ferris State Univ., 3 Nat'l Disability L. Rep. 131 (OCR 1992) (finding that the University discriminated against a student with paraplegia who used a wheelchair when it denied him housing—no student had ever been denied housing and some units were accessible; the simple reassignment of a student without a disability to another room was all that was necessary for the student with a disability to gain access).

Accessibility Checklist

This chapter includes a checklist that may be used to assist college officials in making their programs accessible to the disabled. Departure from any specific requirement is permitted only if the use of other standards or methods provides for even greater access or usability by students with disabilities.

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[40] Franklin and Marshall Coll., 1 Nat'l Disability L. Rep. 243 (OCR 1990) (finding that although some dormitory facilities were not accessible, similar dormitories were accessible and, when viewed in their entirety, were in compliance; but that programs housed in the Arts House were not provided in an alternative accessible location and were therefore in violation of § 504).

[41] College of Notre Dame, 2 Nat'l Disability L. Rep. 209 (OCR 1991) (holding that the College failed to provide adequate accessible shower and bath facilities and access to the residence hall lobby given the presence of steps and piled carpeting).

[42] 34 CFR § 104.45(a) & (b).

[43] 34 C.F.R. § 104.45(b).

[44] 34 C.F.R. § 106.32.

[45] Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).

[46] Fleming v. New York Univ., 865 F.2d 478 (2d Cir. 1989) (concluding that the plaintiff failed to show that he was discriminated against when he was assigned a double room in an undergraduate dormitory); Preny v. University of Chicago, 4 Nat'l Disability L. Rep. 53 (N.D. Ill. 1993) (dismissing claim for lack of standing where a father alleged discrimination when his son was moved to a new residence hall room); Southern Illinois Univ. at Carbondale, 1 Nat'l Disability L. Rep. 143 (OCR 1990) (prohibiting University officials from assigning a wheelchair-confined student to a room that was not fully accessible; the University attempted to support its decision by arguing that a fully accessible room was not needed, given that the student had a personal care attendant).

Guidelines for the Practitioner

To assist practitioners in their efforts to appropriately accommodate students with physical disabilities, the following guidelines are provided:

(1) Require proper documentation from a physician or other appropriate health care professional.

(2) Review the documentation timely, and provide the necessary accommodations and modifications as appropriate.

(3) Publish timelines for documentation submission to permit an efficient review of information; be flexible, however—some students will decide at the eleventh hour to apply.

(4) Establish good working relationships with other administrative and support units of the college to ensure cooperation and the efficient provision of services.

(5) Conduct your own accessibility study of your campus. You will find literally dozens of violations. Do not panic, however, as most problems are easily corrected, even with little or no budget.

(6) Provide the necessary signage around campus. Mobility-impaired students are seldom provided with the necessary information on where to park and access buildings. Be sure that there is adequate signage inside buildings directing students to accessible bathrooms, telephones, water fountains, etc.

(7) Inspect dining halls and residence halls to ensure access and the availability of comparable facilities.

(8) When violations are found, move quickly to correct them. When students point out a violation, respond positively, not defensively.

Table 4-1
Access Checklist

Accessible Entrances & Exits

Parking and Drop-off Areas

Are an adequate number of accessible parking spaces available (8-feet wide for cars plus 5-foot, striped access aisle)? Two accessible parking spaces may share a common access aisle, however. (4.6.3 UFAS) Yes _____ No _____

For guidance in determining the appropriate number to designate, the table below gives the UFAS requirements for new construction and alterations: (4.1.1(5)(a) UFAS)

Spaces	Access	Spaces	Access
1-25	1 space	201-300	7 spaces
26-50	2 spaces	301-400	8 spaces
51-75	3 spaces	401-500	9 spaces
76-100	4 spaces	501-1,000	2% of total
101-150	5 spaces	1,001+	20 + 1 for each 100 over 1,000
151-200	6 spaces		

Is at least 1 of every 8 accessible spaces van-accessible? (4.1.2(5)(b) AAGBF) Yes _____ No _____

Are adjacent spaces for vans at least 96 inches wide? (4.6.3 UFAS) Yes _____ No _____

Do parking spaces designated as van spaces have a vertical clearance of at least 114 inches? (4.6.6 UFAS) Yes _____ No _____

Is there an accessible route between the accessible space and the accessible entrance? (4.6.2 UFAS) Yes _____ No _____

Are accessible spaces marked with the International Symbol of Accessibility? (4.6.4 UFAS) Yes _____ No _____

Can the International Symbol of Accessibility be obscured by a vehicle parking in the space? (4.6.4 UFAS) Yes _____ No _____

Are there signs reading "Van Accessible" at van spaces? (4.6.4 AAGBF) Yes _____ No _____

Is the slope of the parking surface no greater than 1:50? (4.6.3 UFAS) Slope is given as a ratio of the height to the length. Yes _____ No _____

Where visitor parking is provided, are 2% of spaces, but at least one, reserved for the disabled? (4.1.1(5)(d)(iii) UFAS) Yes _____ No _____

In new construction, are at least 50% of all public entrances accessible? (4.1.3(8)(a)(i) AAGBF) Yes _____ No _____

Path of Travel

Is there at least one accessible route connecting accessible buildings, facilities, elements, and spaces? (4.1.1(2), 4.1.2(1), & 4.3.2(2) UFAS)
Yes _____ No _____

Is there a path of travel that does not require the use of stairs? (4.3.8 UFAS)
Yes _____ No _____

Is the path of travel stable, firm, and slip-resistant? (4.5.1 UFAS)
Yes _____ No _____

Is the path at least 36 inches wide? (4.8.3 & 4.3.3 UFAS) Yes _____ No _____

Can all objects protruding into the path be detected by a person with a visual disability using a cane? [In order to be detected using a cane, an object must be within 27 inches of the ground. Objects hanging or mounted overhead must be higher than 80 inches to provide clear head room. It is not necessary to remove objects that protrude less than 4 inches from the wall.] (4.4.1 UFAS)
Yes _____ No _____

Ramps

Are the slopes of ramps no greater than 1:12? (4.8.2 UFAS) Slope is given as a ratio of the height to the length. [A ratio of 1:12 means for every 12 inches along the base of the ramp, the height increases 1 inch. Accordingly, for a 1:12 maximum slope, at least 1 foot of ramp length is needed for each inch of height.] Yes _____ No _____

Do all ramps longer than 6 feet have railings on both sides? (4.8.5 UFAS)
Yes ____ No _____

Are railings sturdy and between 30 and 34 inches high? (4.8.5(5) UFAS)
Yes _____ No _____

Are ramps nonslip? (4.5.1 UFAS) Yes _____ No _____

Is there a 5-foot-long, level landing at every 30-foot horizontal length of ramp, at the top and bottom of ramps, and at switchbacks? (4.8.4(2) & (3) AAGBF)
Yes _____ No _____

Does the ramp rise no more than 30 inches between landings? (4.8.2 AAGBF)
Yes _____ No _____

Entrances

Is the accessible entrance connected by an accessible route to existing public transportation stops, accessible parking and passenger loading zones, and public streets or sidewalks? (4.14.1 UFAS)
Yes _____ No _____

Is a service entrance used as the accessible entrance when there are other options? (4.14.2 UFAS) Yes _____ No _____

Do all inaccessible entrances have signs indicating the location of the nearest accessible entrance? (4.1.2(7)(c) & 4.1.3(8)(d) AAGBF) Yes _____ No _____

Does the entrance door have at least 32 inches clear opening (for a double door, at least one 32-inch leaf)? (4.13.5 UFAS) Yes _____ No _____

Is there at least 18 inches of clear wall space on the pull side of the door next to the handle? (4.13.6, figure 25 AAGBF) [A person using a wheelchair needs this space to get close enough to open the door.] Yes _____ No _____

Does the threshold exceed 3/4 inch for exterior sliding doors or 1/2 inch for other types of doors? (4.13.8 UFAS) Yes _____ No _____

Are doormats 1/2 inch high or less, and secured to the floor at all edges? (4.5.3 AAGBF) Yes _____ No _____

Is the door handle no higher than 48 inches? (4.13.9 UFAS)
Yes _____ No _____

Can the handle be operated without tight grasping, tight pinching, or twisting of the wrist? (4.13.9 UFAS) Yes _____ No _____

Can doors be opened without too much force (maximum is 5 lbs.)? (4.13.11 UFAS) [You can use a fish scale to measure the force required to open a door. Attach the hook of the scale to the doorknob or handle. Pull on the ring end of the scale until the door opens, and read off the amount of force required. If you do not have a fish scale, you will need to judge subjectively whether the door is easy enough to open.] Yes _____ No _____

If the door has a closer, does it take at least 3 seconds to close? (4.13.10 UFAS)
Yes _____ No _____

Is more than 15 lbs. required to stop the door from closing? (4.13.12 UFAS)
Yes _____ No _____

Do all emergency alarms have both flashing lights and audible signals? (4.28 AAGBF) Yes _____ No _____

Mobility Within Buildings

Vertical Circulation—Stairs, Elevators, and Lifts

Are floor surfaces nonslip? (4.5.1 AAGBF) Yes _____ No _____

Do stairs have continuous rails on both sides, with extensions beyond the top (12 inches or greater) and bottom (12 inches plus the width of 1 tread or greater) stairs? (4.9.4(1) & 4.9.4(2) AAGBF) Yes _____ No _____

Are there both visible and verbal or audible door opening/closing and floor indicators (one tone = up, two tones = down)? (4.10.4 UFAS)
Yes _____ No _____

Are the call buttons for the elevator in the hallway no higher than 42 inches? (4.10.3 UFAS) Yes _____ No _____

Are elevator floor buttons no higher than 48 inches (54 inches if lowering the buttons would substantially increase the cost)? (4.10.12(3) UFAS)
Yes _____ No _____

Do the controls outside and inside the elevator cab have raised and Braille lettering? (4.10.12(2) AAGBF) Yes _____ No _____

Does the door reopen if obstructed? (4.10.6 UFAS) Yes _____ No _____

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Is there a sign, 60 inches from the floor, on both jambs at each floor identifying the floor in raised and Braille letters? (4.10.5 AAGBF) Yes _____ No _____

Is the emergency intercom usable without voice communication? (4.10.14 UFAS) Yes _____ No _____

Are there Braille and raised-letter instructions for the emergency communication system? (4.10.14 AAGBF) Yes _____ No _____

Does the elevator remain fully open for at least 3 seconds? (4.10.8 UFAS) Yes _____ No _____

Can the platform lift be used without assistance? (4.11.3 UFAS) Yes _____ No _____

Is there at least 30 X 48 inches of clear space for a person using a wheelchair to approach and reach the controls and use the lift? (4.2.4.1 UFAS) Yes _____ No _____

Are controls between 15 and 48 inches high (between 9 and 54 inches if a side approach is possible)? (4.2.5 & 4.2.6 UFAS) Yes _____ No _____

Can the lift be operated with one hand without the use of a tight grasp, tight pinch, or twist of the wrist? (4.27.4 UFAS) Yes _____ No _____

Horizontal Circulation

Are all public spaces on an accessible path of travel? (4.3 AAGBF) Yes _____ No _____

Is the accessible route to all public spaces at least 36 inches wide? (4.3.3 UFAS) Yes _____ No _____

Is there a 5-foot circle or a T-shaped space for a person using a wheelchair to reverse direction? [A person using a wheelchair needs 36 inches of clear width for forward movement, and a 5-foot-diameter clear space or a T-shaped space to make turns. A minimum distance of 48 inches, clear of the door swing, is needed between the two doors of an entry vestibule.] (A4.2.3 & 4.13.7 UFAS) Yes _____ No _____

Doors

On the pull side of doors, next to the handle, is there at least 18 inches of clear wall space so that a person using a wheelchair can get near enough to open the door? (4.13.6, fig. 25 AAGBF) Yes _____ No _____

Does the doorway provide a clear opening of at least 32 inches? (4.13.5 UFAS) Yes _____ No _____

Are doors equipped with accessible handles (operable without tight grasping, tight pinching, or twisting of the wrist), mounted no higher than 48 inches? (4.13.9 UFAS) Yes _____ No _____

Can doors be opened easily (5 lbs. maximum force)? (4.13.11(2)(b) UFAS) Yes _____ No _____

Can the door be opened with one hand without a tight grasp, tight pinch, or twist of the wrist? (4.13.9 UFAS) Yes _____ No _____

Rooms and Spaces

Is there a 5-foot circle or T-shaped space for turning a wheelchair completely? (A4.2.3 & 4.13.7 UFAS) [see *horizontal circulation*] Yes _____ No _____

Are accessible spaces and dwelling units connected by an accessible route? (4.1.3(3) UFAS) Yes _____ No _____

Is carpeting low-pile, tightly woven, and securely attached along edges? (4.5.3 AAGBF) Yes _____ No _____

In routes through public areas, do all obstacles located between 27 and 80 inches from the floor protrude less than 4 inches from the wall? (4.4.1 UFAS) Yes _____ No _____

Do signs designating permanent rooms and spaces, such as restroom signs, exit signs, and room numbers, comply with the appropriate requirements for accessible signage? (A4.30, 4.30, & 4.1.1(7) UFAS) Yes _____ No _____

Controls

Are all controls that are available for use by the public (including electrical, mechanical, window, cabinet, game, and self-service controls) located at an accessible height? (4.27.3, 4.2.5, & 4.2.6 UFAS) [Reach ranges: The maximum height for a side reach is 54 inches; for a forward reach, 48 inches. The minimum reachable height is 15 inches.] Yes _____ No _____

Are the controls operable without the use of a tight grasp, tight pinch, or twist of the wrist? (4.27.4 UFAS) Yes _____ No _____

Seats, Tables, and Work Surfaces

Are the aisles between chairs or tables at least 36 inches wide? (4.3.3 UFAS) Yes _____ No _____

Are the spaces for wheelchair seating distributed throughout? (4.33.3 AAGBF) Yes _____ No _____

Are at least 5% (but always at least one) of seats, tables, or work surfaces accessible to the disabled? (4.1.2(17) UFAS) Yes _____ No _____

Are the tops of accessible tables or counters between 28 and 34 inches high? (4.32.4 UFAS) Yes _____ No _____

Are knee spaces at accessible tables at least 27 inches high, 30 inches wide, and 19 inches deep? (4.32.3 UFAS) Yes _____ No _____

Restrooms

Getting to the Restrooms

If restrooms are available, is at least one restroom (one for each sex, or unisex) fully accessible? (4.22.4 UFAS) Yes _____ No _____

Are there signs at inaccessible restrooms that give directions to accessible ones? (4.1.2(7)(d) AAGBF) Yes _____ No _____

Is there a 36-inch wide path to all fixtures? (A4.2.1(2) UFAS) Yes _____ No _____

Urinals and Toilets

Is the force necessary to flush no greater than 5 lbs.? (4.27.4 UFAS) Yes _____ No _____

Are flush controls automatic or capable of being operated with one hand without tight grasping, tight pinching, or a twist of the wrist? (4.27.4 & 4.18.4 UFAS) Yes _____ No _____

Is the rim no higher than 17 inches? (4.18.2 UFAS) Yes _____ No _____

Does one urinal have a 30 X 48 inch clear space in front? (4.18.3 UFAS) Yes _____ No _____

Is the flush mounted no higher than 44 inches? (4.18.4 UFAS) Yes _____ No _____

Does the seat return to lifted position when not in use? (4.16.3 UFAS) Yes _____ No _____

Is the toilet seat 17 to 19 inches high? (4.16.3; however, A4.16.3 specifies 18 inches UFAS) Yes _____ No _____

Is the force necessary to flush no greater than 5 lbs.? (4.27.4 UFAS) Yes _____ No _____

Is the flush mounted no higher than 44 inches? (4.16.5 UFAS) Yes _____ No _____

Are flush controls operable with one hand without tight grasping, tight pinching, or twisting of the wrist? (4.27.4 UFAS) Yes _____ No _____

Is the toilet stall door operable inside and out without a tight grasp, tight pinch, or twist of the wrist? (4.27.4 UFAS) Yes _____ No _____

In the accessible toilet stall, are there grab bars behind and on the side wall nearest the toilet? (4.17.6 & A4.16.4 UFAS) Yes _____ No _____

Bathtubs and Showers

Is there clear floor space in front of the bathtub of at least 30 X 60 inches (preferably 48 X 60 inches)? (4.20.2, fig. 33 UFAS) Yes _____ No _____

Is there an in-tub seat at the head end of the tub that is mounted securely and nonslip? (4.20.3 UFAS) Yes _____ No _____

Are grab bars properly installed on the side of the bathtub? (4.20.4 UFAS) Yes _____ No _____

Can controls be operated with one hand without a tight grasp, pinch, or twist of the wrist and with less than 5 lbs. of force? (4.20.5 & 4.27.4 UFAS) Yes _____ No _____

Is the shower stall at least 36 X 36 inches? (4.21.2 UFAS) Yes _____ No _____

Is a seat provided in the shower stall that is mounted 17 to 19 inches high? (4.21.3 UFAS) Yes _____ No _____

Are the controls in the shower stall mounted on the side wall opposite the seat? (4.21.5 UFAS) Yes _____ No _____

Does the shower have a spray unit with a hose at least 60 inches long that can be used as a fixed shower head or as a hand-held shower? (4.21.6 UFAS) Yes _____ No _____

Lavatories

Does one lavatory have a 30 inch wide X 48 inch deep clear space in front? A maximum of 19 inches of the required depth may be under the lavatory. (4.19.3 UFAS) Yes _____ No _____

Is the lavatory rim no higher than 34 inches? (4.19.2 UFAS) Yes _____ No _____

Are there at least 29 inches from the floor to the bottom of the lavatory apron (excluding pipes)? (4.19.2 UFAS) Yes _____ No _____

Can the faucet be operated with one hand without a tight grasp, pinch, or twist of the wrist? (4.19.5 & 4.27.4 UFAS) Yes _____ No _____

Are soap and other dispensers and hand dryers no more than 48 inches (54 inches if a side approach is possible) high and usable without a tight grasp, pinch, or twist of the wrist? (4.22.7 & 4.27.4 UFAS) Yes ____ No _____

Is the mirror mounted with the bottom edge of the reflecting surface no higher than 40 inches? (4.19.6 UFAS) Yes _____ No _____

Drinking Fountains

Is there at least one fountain with clear floor space of at least 30 X 48 inches in front? (4.15.5(1) UFAS) Yes _____ No _____

Is there one fountain with its spout no higher than 36 inches from the ground with a flow of water at least 4 inches high? (4.15.2 & 4.15.3 UFAS) Yes _____ No _____

Are controls mounted on the front or on the side near the front edge, and operable with one hand without a tight grasp, pinch, or twist of the wrist? (4.27.4 & 4.15.4 UFAS) Yes _____ No _____

Does the fountain protrude no more than 4 inches into the circulation space? (A4.4.1 UFAS) Yes _____ No _____

In new construction, are 50% of drinking fountains on any given floor accessible? (4.1.1(9) UFAS) Yes _____ No _____

Telephones

If pay or public use phones are provided, is there clear floor space of at least 30 X 48 inches in front of at least one? (4.31.2 UFAS) Yes _____ No _____

Is the highest operable part of the phone no higher than 48 inches (up to 54 inches if a side approach is possible)? (4.31.3, 4.2.5, & 4.2.6 UFAS) Yes _____ No _____

Does the phone protrude no more than 4 inches into the circulation space? (4.31.4 & 4.4.1 UFAS) Yes _____ No _____

Does the phone have push-button controls? (4.31.6 UFAS) Yes _____ No _____

Is the phone equipped with a receiver that generates a magnetic field in the area of the receiver? (4.31.5 UFAS) Yes _____ No _____

Is the phone adapted with volume control? (4.31.5 UFAS) Yes _____ No _____

Is the phone with volume control identified with appropriate signage? (4.1.3(17)(b) & 4.30.7(2) AAGBF) Yes _____ No _____

Is one of the phones equipped with a text telephone (TT or TDD)? (4.31.9 & A4.31.9 AAGBF) Yes _____ No _____

Is the location of the next text telephone identified by accessible signage bearing the International TDD Symbol? (4.30.7(3) AAGBF) Yes _____ No _____

Is the cord length at least 29 inches long? (4.31.8 UFAS) Yes _____ No _____

Cafeterias

Are the aisles between tables and food service lines at least 36 inches wide? [preferred clear width is 42 inches] (5.2 UFAS) Yes _____ No _____

Are at least 5% of all fixed seats and tables accessible? (5.1 UFAS) Yes _____ No _____

Are accessible tables distributed throughout the space? (5.1 UFAS) Yes _____ No _____

Health Care

Is there at least one accessible entrance with a canopy or overhang for protection from the weather? (6.2 UFAS) Yes _____ No _____

In an accessible one-bed bedroom, are there at least 36 inches of clear floor space along each side of the bed and 42 inches between the front of the bed and the wall? (6.3(2) UFAS) Yes _____ No _____

In an accessible two-bed bedroom, are there a minimum of 42 inches of clear floor space (preferably 48 inches) between the foot of the bed and the wall; 36 inches between the side of the bed and the wall; and 48 inches between beds? (6.3(3) UFAS) Yes _____ No _____

Source: Barrier Free Environments & Adaptive Environments Center, *Uniform Federal Accessibility Standards, 41 CFR subpart 101-19.6* , UFAS Accessibility Checklist, *at* http://www.adata.org/atbcb/ufas-chk.htm (June 1990).

5

Admission and Financial Aid

Colleges and universities [hereafter referred to as colleges] may not discriminate against persons with disabilities in admissions or in the provision of financial aid. Few colleges today facially discriminate against the disabled (e.g., to deny admission to a person who is wheelchair confined), but may engage in facially neutral practices that result in disparate impact (e.g., the use of test scores and physical requirements in admissions; application of semester limitations on financial aid). Although most of these practices are permissible, some will at times violate federal law. Legal issues related to admission and financial aid are reviewed below.

Admission

Qualified students with disabilities may not, on the basis of disability, be denied admission or be subjected to discrimination during the admission or recruitment process.[1] Furthermore, colleges may not apply limitations on the total number or proportion of students with disabilities who may be admitted.[2] To begin the admissions process, prospective students typically complete application materials, take standardized and institutionally developed tests, participate in interviews, prepare a writing sample, and/or assimilate a portfolio of previous works and additional records. Moreover, colleges often consider factors such as "standing" at previous institutions,[3] prior experience at the current institution,[4] whether re-admission conditions have been met for those who were previously dismissed,[5] quality of reference letters,[6] and the like in making the decision whether to admit.

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[1] 34 CFR § 104.42(a). *See also* Pennsylvania State Univ., 2 Nat'l Disability L. Rep. 35 (OCR 1991) (concluding that a policy requiring applicants with known behavioral problems to be subjected to heightened scrutiny violated federal regulations—a hold was placed on an individual's file and the individual was required to submit requested information; the policy failed to distinguish between applicants with disabling conditions who could pose a risk of harm and applicants who merely had a history of disability).

[2] 34 CFR § 104.42(b)(1).

[3] University of Wisconsin-Madison, 2 Nat'l Disability L. Rep. 57 (OCR 1991) (finding no discrimination when a medical student was denied admission based on the plaintiff not being in "good standing" at his previous medical school at the time he sought transfer; the University had consistently applied its "good standing" policy in a three-year period reviewed by OCR).

[4] University of S. Florida, 6 Nat'l Disability L. Rep. 325 (OCR 1995) (finding that a student with peripheral neuropathy, causing pain, weakness, and muscle atrophy, was not discriminated against when he was denied readmission; while a student, he refused accommodations he had requested, performed poorly academically, and failed to participate in an exit interview).

Application

The application must be completed thoroughly and honestly and submitted timely.[7] Intentional misrepresentation on the forms can, and often does, result in either denying admission or removing the student from the program—see Chapter 9. Ideally, forms and directions will be provided in multiple formats that will allow students with disabilities to independently complete related materials. Where this is not feasible or has not yet been accomplished, college officials need to provide individualized assistance. The use of sign-language interpreters or assistive technology may be necessary.

Regardless whether information is gathered orally or in writing, officials may not make pre-admission inquiries as to whether applicants have disabilities, unless it is taking either remedial action to correct the effects of past discrimination or voluntary action to address prior limited participation. Applicants should be informed that submitting the disability-based information is voluntary, that failure to submit will not adversely affect their admission or status within the college, and that any submitted information will be kept confidential.[8]

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[5] Haight v. Hawaii Pacific Univ., 10 Nat'l Disability L. Rep. 158 (9th Cir. 1997) (upholding an action of the University in the dismissal of a nursing student—the plaintiff failed to document a disability and appeared to rely on the University to gather information regarding his alleged disability; moreover, he never attempted to fulfill the agreed-upon re-admission conditions).

[6] Washington and Lee Univ., 5 Nat'l Disability L. Rep. 78 (OCR 1993) (concluding that a student with dyslexia and Attention-deficit Disorder did not meet criteria for admission to law school; the student's reference letters were not exceptional and his personal statement demonstrated poor writing skills).

[7] Glendale Cmty. Coll., 5 Nat'l Disability L. Rep. 36 (OCR 1993) (observing that complainant failed to complete an application form and therefore had not met the technical standards required for admission); Cleveland State Univ., 3 Nat'l Disability L. Rep. 198 (OCR 1992) (finding insufficient evidence to support a claim of re-admission discrimination for a former law student who had a learning disability; his petition for re-admission was read by faculty as not being honest and truthful and he had not taken steps to rectify his performance-related problems); Kent State Univ., 3 Nat'l Disability L. Rep. 132 (OCR 1992) (upholding denial of admission, given that the student failed to complete the application process).

[8] 34 CFR § 104.42(b)(4) & (c).

Tests

In addition to the provision of information cited above, the student in most instances will be required to take a variety of tests. The American College Testing Program (ACT) and the Scholastic Assessment Test (SAT) are commonly used for admission to undergraduate studies, while the Graduate Record Examination (GRE), the Miller Analogies Test (MAT), the Law School Admission Test (LSAT), the Medical College Admission Test (MCAT), and the Graduate Management Admission Test (GMAT), among others are used for postbaccalaureate study. Colleges vary in regard to the selection of tests and cut-off scores. Resulting scores in most instances may be considered in making an admissions decision;[9] however, admissions officials should not devalue scores that have an asterisk or "flag" (indicating that the test was taken under nonstandard conditions) unless substantial justification can be provided.

Furthermore, colleges often require that undergraduate program applicants submit to a battery of locally administered and developed tests (generally in writing, reading, and math). Resulting test scores are used in making admissions decisions and/or in determining the level of course work in which to place the student (e.g., honors, regular, or remedial English). For students who have sufficiently documented their disabilities, accommodations during testing may be justified.

Notwithstanding the discretion to use both standardized and locally developed tests, colleges may not use a test or other criterion for admission that has a disproportionate adverse effect on persons with disabilities, unless the test has been validated for its intended purpose (e.g., as a predictor of success in the education program or activity) and alternate assessments with a less adverse effect are not available. Importantly, it is the responsibility of the Assistant Secretary of the Department of Education to identify alternate assessment instruments that serve the intended purpose but without adverse impact.[10] To date, the Secretary has found no substitute for any of the major validated standardized tests, and is unlikely to be able to do so in the future. Nonetheless, any instrument that is selected must reflect applicants' aptitudes, achievements, skills, or abilities, rather than their impaired sensory, manual, or speaking skills (except where those skills are the ones being measured).[11] When tests are administered specifically for students with impaired skills, they must be offered as often as are other admissions tests and administered in accessible facilities.[12]

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[9] University of Akron, 3 Nat'l Disability L. Rep. 117 (OCR 1992) (concluding that an applicant to law school was not qualified for admission; the applicant's LSAT scores were in the lowest lst and 2nd percentiles); University of Michigan, 2 Nat'l Disability L. Rep. 302 (OCR 1991) (finding that a law school denied admission based on low GPA and LSAT scores and not disability; also, the University did not inappropriately use nonstandard LSAT scores).

[10] 34 CFR § 104.42(b)(2).

Interviews

It is common in graduate programs, somewhat less common in undergraduate programs, to have one or more face-to-face interviews and to consider the student's performance as one of several factors in making an admissions decision.[13] Such an activity permits the faculty or admissions official to ask relevant and clarifying questions unanswered in the paper file and to better assess the potential of the aspiring student. Because many physical impairments will become visible at this time, officials may become aware of a possible disability of which they had no prior knowledge. It is important that the interview not focus on the student's perceived disability; instead, it should target the applicant's abilities and potential. However, interviewers are permitted to inquire as to how the prospective student would be able to meet specific academic and physical requirements (such as mobility, manual dexterity, or endurance requirements, the ability to communicate, the ability to retrieve information) of the program. (For example, how would a student who suffers from quadriplegia complete the clinical requirements of a medical program?[14]). Note that if the applicant is otherwise qualified for admission (either with accommodation or without), knowledge of a disability should neither help nor hinder the effort to matriculate.

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[11] 34 CFR § 104.42(b)(3)(i).

[12] 34 CFR § 104.42(b)(3)(ii) & (iii).

[13] Fruth v. New York Univ., 2 AD Cas. 1197 (S.D.N.Y. 1993) (denying a preliminary injunction to learning-disabled student who was denied admission due to prior record, personal interview, test results, letters of recommendation, and refusal to participate in the access to learning program as a condition of acceptance).

[14] Thomas Jefferson Univ., 1 Nat'l Disability L. Rep. 229 (OCR 1990) (upholding medical school decision denying admission to a student who suffered from quadriplegia; the University proposed that no accommodations could enable the plaintiff to complete the clinical requirements of the program—the student had C-5 quadriplegia indicating that he sustained an injury to the fifth vertebrae of his spinal column and was very limited in the use of his arms and hands, had no use of his legs, and was substantially limited in his functioning from his neck down).

Writing Sample

Inclusion of a writing sample within a student's application materials is increasingly being required. Undergraduate programs often mandate that a "personal statement" be submitted regarding applicants' aspirations or stating why they selected the particular programs or professions. At the graduate level, similar statements may be solicited, or a student might be asked to respond to a more technical question, given his or her previous training within the field.

Such writing tests or samples have become important in the effort to assess applicants' language and writing skills. At one time, faculty relied more heavily on the student having earned a high school diploma (for undergraduate programs) or a baccalaureate degree, licensure, or certification (for graduate programs). Today, unfortunately, many students with prior degrees and even respectable grade point averages (GPAs), particularly within less demanding majors, have deficient skills. For whatever combination of reasons (grade inflation; grading based on effort, attendance, attitude, conduct, or sport participation rather than performance; cheating and plagiarism; degree received from a "diploma mill," unaccredited institution, or college/program with particularly low standards), more than a prerequisite degree or even GPA is needed to ensure that the applicant has the basic skills necessary to foreseeably succeed.

Portfolios

The use of portfolios allows the student to collect additional supportive documentation that may be examined and considered in the admissions process. Included may be a prior thesis, term papers, tests, publications, art or graphic work, software, and additional letters of reference, among others. The contents of each portfolio will differ by student and program but should reflect what the student perceives will best represent his or her competency. These materials should serve as a basis for discussion during the interview process and help faculty come to an admissions decision.

Academic Freedom and Deference in Making Admission Decisions

Academic freedom, as outlined by the Supreme Court in *Sweezy v. New Hampshire*,[15] includes the right to determine who may teach, what is taught, how to teach, and who may be admitted to study. The final provision (i.e., who may be admitted to study), although generally upheld, at times has been found to be in conflict with the rights of students with disabilities. It is accepted that faculty have the right to admit the "best" qualified students within a large pool of qualified students or to select qualified students over those who are unqualified. However, both the criteria selected and the procedures used have been challenged.

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[15] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

In an effort to provide guidance when reviewing matters related to education, the Supreme Court, in *Regents of the University of Michigan v. Ewing*,[16] proposed that courts "should show great respect for [a] faculty's professional judgment" when reviewing "the substance of a genuinely academic decision."[17] The Court indicated that judges have limited knowledge of academe when compared to experienced college administrators and professors and are particularly ill-equipped to evaluate academic performance. With this directive, circuits courts with some exceptions have given deference to college officials,[18] although practices that serve "no other purpose than to deny an education to a person with a disability"[19] or discriminate based on disability[20] have not been permitted.

Making the Admission Decision

Selecting the "best" qualified students from a pool of applicants is a difficult task, due to the complexity of assessing each person's abilities and motivation and the difficulty of projecting his or her probability of succeeding within the chosen program. Given the limitations of any single criterion, it is clear that numerous criteria need to be used;[21] also, it is prudent (although not required) to subject each applicant to an holistic evaluation[22] to determine what individuals would bring to the program if admitted. In this publication, *holistic evaluation* represents the effort by faculty to go beyond traditional paper indicators of success (e.g., test scores, GPA). This can be accomplished through use of an interview process; observations of the applicant in prior internships, externships, clerkships, and clinicals; observations of the applicant in laboratories or while interacting with peers and professionals within the chosen field; development of a portfolio; assessment of prior life experience; and any other methods that will enable admissions officials to select the best qualified applicants. For example, it could be that the perseverance exhibited by a student with a disability may be a factor that would surface in an effort to assess holistically and contribute to a positive admissions decision. Such a quality (perseverance) would not have entered into the decision-making process in a traditional review of paper credentials. If individual assessment is provided for each student, good faith decisions using professional judgment to admit the "best" students from among a pool of qualified candidates would likely be upheld in court.[23]

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[16] Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985).

[17] *Id.* at 225.

[18] McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993); Wynne v. Tufts Univ. Sch. of Med. (Wynne I), 932 F.2d 19 (1st Cir. 1991); Doherty v. Southern Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988), *reh'g denied, cert. denied*, 493 U.S. 810 (1989); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981). *But see* Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981) (refusing to adopt deference standard).

[19] Zukle v. Regents of the Univ. of California, 166 F.3d 1041, 1048 (9th Cir. 1999); Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981).

[20] Wong v. Regents of the Univ. of California, 192 F.3d 807, 817 (9th Cir. 1999); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 859 (5th Cir. 1993).

[21] University of Minnesota, 6 Nat'l Disability L. Rep. 295 (OCR 1995) (concluding that a student with a learning disability was denied admission to law school based on his low GPA and LSAT and not his disability; the University also had made modifications to its admission criteria and procedures to consider

Selected criteria should not disproportionately screen out individuals with disabilities unless shown to be necessary for the provision of the service or program.[24] Moreover, once the criteria are

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complainant's qualifications—individual committee members reviewed his entire file rather than rely on scores alone).

[22] Mallett v. Marquette Univ., No. 94-3246, 1995 U.S. App. LEXIS 24324 (7th Cir. August 24, 1995) (affirming a lower court decision where the court granted summary judgment for the University; the law school applicant had been denied admission based on his low score on a nonstandard LSAT—scoring in the lower 1-2%; the admissions committee considered the score, but also gave careful attention to his entire file, including life experiences and background and had concluded that he was not qualified).

[23] Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (granting summary judgment to the University in a case where a medical student with psychiatric and mental disorders—i.e., Personality Disorder, self-destructive and antisocial behavior—failed to establish that she had a substantial likelihood of prevailing and thus was denied a preliminary injunction; even if a risk of recurrence were only minimal, the University may consider that fact in determining whether she was more or less qualified than other applicants); University of California Santa Cruz, 5 Nat'l Disability L. Rep. 37 (OCR 1993) (concluding that the complainant, although qualified, was not as well qualified as those who were admitted to a selective program).

[24] 28 CFR § 35.130(b)(8); 28 CFR § 36.301(a). *See also* 34 § 104.42(d) (stipulating that colleges may base prediction equations on first-year grades, but must conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores).

identified, faculty need to determine how resulting information will be used in the selection process (e.g., what the cut-off score will be; whether weights will be used). Every effort needs to be made to reduce bias in the admissions process whenever possible (e.g., by having a blind review of writing samples). Note, however, that all students should be required to meet the same set of standards.[25] Nonetheless, officials should not eschew their obligation to consider the need for possible modifications and accommodations (e.g., additional time to take a locally administered test) in determining whether any given applicant is otherwise qualified .

Once the admissions decision is made, it may be that a student with a disability has been screened out. If the student felt qualified for admission (or comparatively better qualified in programs with selective admissions), and if the administrative appeal proved unsuccessful, the student may elect to file an administrative complaint (e.g., with the Department of Justice—DOJ) or a suit in either federal or state court. Such claims generally fail, however.

Bases for Failing Claims

Denied applicants often are unable to document that they have a disability or that their respective disabilities substantially limit a major life activity; show that they informed college officials of their disability and need for accommodation; identify reasonable accommodations or modifications that will enable them to complete all essential program requirements; demonstrate that they meet admission requirements (both academic and physical); or support the position that they are comparatively better qualified than other applicants who were admitted. Furthermore, many persons denied admission elect not to file suit, given the costs associated with this type of litigation versus the possible gains. Each of these issues is discussed below.

Failure to support the existence of a disability

Federal law requires appropriate accommodations and modifications only for students who are disabled; no adjustments are necessary for students without disabilities. As discussed in Chapter 2, it is the student, not the college, who is responsible for documenting the nature and extent of the impairment,[26] showing that it is substantially limiting,[27] and supporting the need for accommodation.[28] Failure to meet this burden effectively eliminates the possibility that the student will ever receive accommodations reserved for the disabled or have a basis for filing a disability claim.

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[25] Riedel v. Board of Regents of Kansas, 4 Nat'l Disability L. Rep. 276 (D.C. Kan. 1993) (granting summary judgment for a medical school; the court reasoned that a former student with a learning disability failed to show that the medical school discriminated against him by refusing to waive its policy of allowing only four attempts at the national board examination); Hastings Coll. of Law, 4 Nat'l Disability L. Rep. 226 (OCR 1993) (concluding that the College did not discriminate against a learning-disabled student when it denied him admission; the College may apply the same standards to all students, although it

Failure to inform officials of a disability

In a fair number of administrative complaints and court cases the plaintiffs alleged intentional disability-based discrimination. Plaintiffs lost when it was shown that college officials were not even aware that they had a disability.[29] In some of these claims, the students had already been denied admission or removed from a program, and only later were assessed and learned of their disabilities. Obviously, prior knowledge of the disability would be requisite to a successful claim that officials discriminated because of disability.

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must include an evaluation of how the student's disability affected performance and whether the student has been provided with necessary academic adjustments and auxiliary aids).

[26] McGuinness v. University of New Mexico Sch. of Med., 170 F.3d 974 (10th Cir. 1998) (holding that having a test anxiety without more did not qualify as a disability under the ADA or § 504); Foremayne v. University of Pennsylvania, 9 Nat'l Disability L. Rep. 36 (E.D. Pa. 1996) (finding no evidence of racial or disability discrimination in a University's decision to deny plaintiff admission to a Ph.D. program in education who had low GRE scores; moreover, plaintiff failed to show that she had a disability).

[27] Davidson County Cmty. Coll., 6 Nat'l Disability L. Rep. 232 (OCR 1994) (concluding that the complainant had no limitation of any major life activity; he had surgery for his severe sciatic neuritis and had not experienced pain since).

[28] University of Cent. Florida, 13 Nat'l Disability L. Rep. 128 (OCR 1998) (finding that the complainant was not eligible for testing accommodations because she failed to register with the SDS office and properly document her disability and need for adjustments).

[29] California State Univ., 7 Nat'l Disability L. Rep. 96 (OCR 1995) (concluding that a student with an emotional disability who was denied re-admission to a teaching program was not discriminated against due to disability; two of three members of the admissions committee were unaware of the student's disability); University of Oklahoma—Norman, 5 Nat'l Disability L. Rep. 116 (OCR 1993) (holding that a student was not qualified for admission to an art history program because she did not have the ability to write, organize, and work independently; moreover, she failed to show that University officials knew of her disability at the time of the admissions decision); East Cent. Cmty. Coll., 4 Nat'l Disability L. Rep. 225 (OCR 1993) (finding that the plaintiff's denial to a nursing program was due to low composite scores and not her disability; in fact, the admissions committee was unaware that the plaintiff had a disability).

Failure to identify reasonable accommodations

Once a determination has been made that a person has an impairment that substantially limits a major life activity, it then must be determined whether the person is qualified to participate in the program or activity. As discussed in Chapter 6, Student Disability Services (SDS) staff are not expected to know all possible accommodation and technology options or to be cutting edge, but should have a general knowledge base and an understanding of the field. Ideally, SDS staff, with student input, will be able to identify a combination of appropriate and reasonable accommodations and modifications that will permit meaningful participation. However, there will be circumstances where no reasonable accommodation will enable the perspective student to participate.[30] For example, a deaf applicant to truck driving school (requested that a sign-language interpreter ride in the cab to provide directions[31]), a deaf applicant to a nursing program (asked that she be exempt from part of the required program[32]), and a blind applicant to medical school (requested that she not be required to "observe" and "perform in a reasonably independent manner" as was required by the Association of American Medical Colleges[33]) were found not to be otherwise qualified. In such cases, it is common for the court to conclude that an "otherwise qualified" person is one who is able to safely and substantially perform an educational program's essential requirements.

Notwithstanding the above, publishing physical requirements for a given program in most instances is not recommended and will likely be found discriminatory. This type of blanket stipulation tends to be based on stereotypic views of persons with disabilities and assumptions about what they cannot do.[34] The preferred approach is to holistically review each individual, assess the applicant's ability to meet essential admission requirements, and use professional judgment in determining the admissibility of each individual.

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[30] Zukle v. Regents of the Univ. of California, 166 F.3d 1041 (9th Cir. 1998) (concluding that a student with a reading disability failed to qualify as otherwise qualified as no reasonable accommodation would allow her to successfully complete the medical program).

[31] Breece v. Alliance Tractor-Trailer Training II, Inc., 824 F. Supp. 576 (E.D. Va. 1993).

[32] Southeast Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

[33] Ohio Civil Rights Comm'n v. Case Western Reserve Univ., 666 N.E.2d 1376 (Ohio 1996).

[34] DePaul Univ., 4 Nat'l Disability L. Rep. 157 (OCR 1993) (finding that the University denied the re-admission of a law student based on stereotypical assessments and failed to consider her ability, given new learning strategies and effective academic adjustments.

Failure to meet admission requirements

The most common bases for denial of admission is that the student fails to meet either published minimum admission standards or agreed upon reinstatement conditions for those who had previously been dismissed (e.g., level, type, and amount of high school course work;[35] GPA;[36] test scores;[37] writing sample;[38] other reasonable requirements[39]).[40] As with test scores discussed above, GPA should be used only in combination with other data to base a decision. Grade point average as a sole criterion can be misleading. Secondary school programs (as well as college programs) vary markedly in their course and program requirements and grading practices, with some having high expectations yet a bell-shaped curve, and others having low expectations yet severe grade inflation. Furthermore, the student may have participated within a K-12 program for special need children and received grades reflecting performance within his or her individualized educational program (IEP). Such a grade may be higher or lower than what the student would have received within a general education course covering the same subject. Accordingly, although GPA is an important criterion to consider, it should be used along with other data that may or may not corroborate the score.

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[35] Middle Tennessee State Univ., 10 Nat'l Disability L. Rep. 383 (OCR 1997) (determining that a University denied admission to a student with a learning disability because he failed to meet academic requirements and minimum standards—did not have the necessary high school course work, earn an acceptable GPA, or meet minimum requirements on the ACT); University of Illinois at Urbana-Champaign, 3 Nat'l Disability L. Rep. 251 (OCR 1991) (holding that a dyslexic student was unqualified for an early admission college program because he applied as a sophomore after having earned only six high school course units when junior status and fifteen earned credits were required).

[36] Halasz v. University of New England, 816 F. Supp. 37 (D. Me. 1993) (holding that a transfer student with a learning disability and Tourette's Syndrome was not otherwise qualified for regular admission to the University given his low GPA of 1.98 and low test scores); Vanderbilt Univ., 4 Nat'l Disability L. Rep. 382 (OCR 1993) (finding that the applicant with a deficit disorder and dyslexia was not qualified for admission to law school; his LSAT score was significantly lower than those who were admitted, even with testing modifications, and his GPA was second lowest); Hahnemann Univ., 3 Nat'l Disability L. Rep. 90 (OCR 1992) (holding that a medical school applicant with a seizure disorder was denied admission to medical school because of a low GPA, not due to disability; all admitted students had a higher GPA than did complainant); Golden Gate Univ., 2 Nat'l Disability L. Rep. 253 (OCR 1991) (finding no violation of § 504 when the University individually considered applicant's file, including a 1.83 GPA, and rejected his reinstatement petition; University policy established 1.85 as the minimum for reconsideration, while the poor quality of complainant's petition itself contributed to his rejection); Cardinal Stritch Coll., 1 Nat'l Disability L. Rep. 145 (OCR 1990) (holding that an applicant to an MBA program had not been rescinded due to learning disability; the applicant had the lowest GPA of all considered and lacked full-time employment experience).

[37] University of Texas at San Antonio, 7 Nat'l Disability Law Rep. 447 (OCR 1995) (concluding that a student did not qualify for waiver of a math requirement for admission to a teacher education program; the student had failed the math portion of the test five times, notwithstanding provision of numerous testing accommodations—additional time, separate room, lunch break after 2:00 p.m., and use of a four-function nonprogrammable calculator); Duke Univ., 4 Nat'l Disability L. Rep. 448 (OCR 1993) (finding that an applicant to law school was denied due to low GPA and LSAT scores, notwithstanding testing accommodations while he took the LSAT, and not due to disability); Yale Univ., 4 Nat'l Disability L. Rep. 262 (OCR 1993) (concluding that a student with Attention-deficit Disorder and dyslexia was denied admission to a law school due to poor LSAT scores—lower 2%—notwithstanding extended test time and a separate testing area).

[38] Emory Univ., 5 Nat'l Disability L. Rep. 79 (OCR 1993) (finding that a student with Attention-deficit Disorder and dyslexia was not otherwise qualified for admission; the student had low LSAT scores under modified testing, low GRE

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scores, and a poor writing sample); Washington and Lee Univ., 5 Nat'l Disability L. Rep. 78 (OCR 1993) (concluding that an applicant to law school was denied in part, not because of dyslexia and attention deficit, but because his personal statement demonstrated poor writing skills).

[39] California State Univ., 7 Nat'l Disability L. Rep. 96 (OCR 1995) (concluding that although the claimant was required to submit two recommendations more than is typically required, such a stipulation was necessary due to her previous withdrawal and not because of her disability; moreover, she was denied readmission due to a lack of knowledge of current teaching methods and lack of experience with school-aged children rather than disability).

[40] Gent v. Radford Univ., 976 F. Supp. 391 (W.D. Va. 1997) (holding that an applicant with mental illness to a graduate program in social work failed to show that he was otherwise qualified); Betts v. Rector and Visitors of Univ. of Virginia, 967 F. Supp. 882 (W.D. Va. 1997) (concluding on a motion for summary judgment that a postbaccalaureate student was not otherwise qualified for medical school, notwithstanding his learning disability); New York Univ., 12 Nat'l Disability L. Rep. 226 (OCR 1997) (concluding that an applicant to a graduate music program was denied admission for nondiscriminatory reasons—overall music skills were rated low, voice was off tune, did not play the guitar, could not improvise or play by ear, had little knowledge of certain kinds of music, was weak in music theory and history, had not taken a prerequisite psychology course, and undergraduate GPA was second lowest of all applicants); Loma Linda Univ., 11 Nat'l Disability L. Rep. 367 (OCR 1997) (concluding that an applicant with a hearing impairment to a medical radiography program—i.e., a program dealing with the use of radiation as X-rays to make images on photographic film—was denied admission due to a relatively low GPA and poor interview score and not disability).

Failure to show that comparative qualifications were better

Meeting minimum qualification will not necessarily result in admission in every instance. Although a significant number of college programs today are not selective in admission (they accept all or nearly all applicants in an effort to maintain or increase enrollment), some programs are selective and have more applicants (both disabled and nondisabled) than they have the capacity to instruct. Decisions then need to be made regarding those to admit to study and those to deny.

The law does not require the admission of less qualified students over better qualified students, the use of different or lower standards to increase the admission of underrepresented populations (including the disabled), or the admission of all minimally qualified applicants.[41] What is required is nondiscrimination and equal protection. (In fact, if in an effort to increase diversity a public college were to give discriminatory preference in admission to persons with disabilities, the Fourteenth Amendment Equal Protection Clause would foreseeably be violated.) To provide applicants with a fair and equal opportunity, the college needs to publish its admission standards and procedures, and then base admission only on those standards, whatever they might be. Interestingly, courts generally will not invalidate admission criteria that do not result in adverse impact against a protected population, even if on the surface they might appear illogical (e.g., admission based on application date or lottery instead of comparative ability or potential).

Cost versus benefit of litigation

Many students who are denied initial admission do not file suit, even if the decision was arbitrary or discriminatory in their view. Most applicants have limited financial resources or do not want to commit the time it takes to litigate. They are anxious to train for and begin their respective careers, to earn a paycheck, or to begin a family. Also, litigation results in an adverse relationship, while applying to another college represents a second opportunity. With some obvious exceptions, most college programs within Carnegie classification[42] are at least similar, if not substantially the same. Why then bother challenging one admissions decision when a nearly comparable college or program is available down the road, possibly less than one hour away.

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[41] *Department of Justice Response to Inquiry*, 9 Nat'l Disability L. Rep. 315 (DOJ 1996) (concluding that the ADA does not require such entities to lower admission or performance standards or to discontinue the use of standardized tests in the admissions process).

The overwhelming majority of cases filed challenging admissions decisions deal with either re-admission (for which the student has past credit-hour production at stake), admission to medical and law schools, or entry to elitist institutions. Because matriculation in these institutions represents a relatively small percent of total postsecondary admissions, most decisions go unchallenged beyond whatever internal administrative appeals may be available.

Bases for Successful Claims

Successful claims of higher education disability discrimination are relatively few in number. This, in part, is due to the fact that most colleges strive to provide equal opportunity and access for all students and have made significant efforts to eliminate facial as well as facially neutral discrimination. Moreover, colleges are reluctant to litigate, especially when the claims are well documented and are likely to be supported in court. If this were to occur, officials generally attempt to reach an agreement with the student and provide the contested accommodation or modification. Given this reality, litigation tends to occur only when college officials feel as though they have complied with the law and the plaintiff is demanding an unreasonable or unnecessary accommodation (such as the elimination of justified program requirements) that would establish a precedent for other requests, lower standards, result in undue hardship, or require substantial alteration to a program.

Notwithstanding the above, a comparatively small number of colleges have been found to have discriminated against students with disabilities either passively (failure to accommodate during the admissions process), actively (refusal to admit), or both.[43]

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[42] Carnegie classifications group American colleges into one of ten categories according to their mission as defined by factors such as highest level of degree conferred. This process is the one most often cited when discussing classification systems for higher education.

[43] *See, e.g.*, Carlin v. Trustees of Boston Univ., 907 F. Supp. 509 (D. Mass. 1995) (denying summary judgment given that sufficient evidence supported plaintiff's claim of pretext in the refusal to re-admit her to a Ph.D. pastoral psychology program; the proffered reasons for her denial were held to be untrue and her mental illness and depression were found to be the basis of the adverse decision). *But see* Washington Univ., 3 Nat'l Disability L. Rep. 327 (OCR 1992) (finding that the University was able to articulate a nondiscriminatory reason for its refusal to allow a student with learning disabilities to

Officials in these circumstances often failed to identify legitimate bases for their adverse decisions, show why each applied criterion was an essential component to training or future employment, document how the criteria were uniformly applied, and/or give each candidate careful and individual consideration (i.e., use of professional judgment).[44]

The Tenth Circuit examined a related case in 1981, *Pushkin v. Regents of the University of Colorado*.[45] Although this case is "old" for a higher education disability case, it still provides an excellent example of proven discrimination. The plaintiff had multiple sclerosis (MS) and was an applicant to a psychiatric residency program. As a result of the MS, he was confined to a wheelchair and limited in his ability to walk and write. The court found him to be otherwise qualified for the program and to have been excluded solely by reason of his disability in violation of section 504 (the ADA did not become law until 1990). Although the University at trial attempted to argue that the plaintiff was rejected because he was comparatively less well qualified than others, the factual record supported the conclusion that his rejection was due to evaluations from four faculty. Each provided comments that were clearly focused on the applicant's disability and articulated assumptions as to what he was incapable of doing. One interviewer proclaimed that the plaintiff "is teachable, but to face the devastation, guilt, pity and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him."[46] Another commented that he doubted whether Dr. Pushkin would be able to work full-time; while yet another indicated that he had a lot of anger due to MS and was "a risk."[47] The fourth interviewer concluded that he would likely be unable to deal with the stress and strain associated with the training and eventual professional practice due to his dis-

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transfer from the adult evening program to the day program—i.e., the relatively high number of drops and withdrawals the student had maintained).

[44] Pepperdine Univ., 7 Nat'l Disability L. Rep. 62 (OCR 1995) (closing a complaint regarding a student who was denied re-admission to a law school allegedly due to dyslexia and Attention-deficit Disorder; the University agreed to provide the student with diagnostic testing, allow the student to refile for admission, convene a committee to consider the student's petition, consult with a qualified professional, and develop guidelines for considering re-admission petitions filed by students claiming disability discrimination).

[45] Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981).

[46] *Id.* at 1387.

[47] *Id.*

ease. There was insufficient proof, however, that plaintiff would in fact represent a risk or be unable to perform his job. The appeals court upheld the trial court decision that the plaintiff had been discriminated against due to disability.

Appeals and Grievance Procedures

Any time a student is adversely affected by an academic decision, the student needs to be made aware of appeals and grievance procedures existing within the college. Formal hearings will not typically be available for academic challenges—see Chapter 9. Most often, students will only have the opportunity to meet with the person(s) making the original adverse decision and, if the decision remains unchanged, the opportunity to challenge that decision to a different person or panel (i.e., the person(s) responsible for the original decision should not participate in the appeal, except as a provider of information). Appeals need to be timely, and any resulting decision needs to be in writing with one copy provided the student and the other retained in the student's college record.[48] This process need not require anything more than an informal give-and-take. Unless the college elects to do otherwise, there is no need for the application of formal rules of evidence, cross examination of "witnesses," or the presence of attorneys. Whatever procedures are used need to be in writing and published within the college bulletin or other document disseminated to students.

Financial Aid

Colleges may not discriminate against, or assist another entity to discriminate against, qualified persons with disabilities on the basis of disability by providing them with less financial assistance than is provided to persons without disabilities or by limiting eligibility for assistance to a specific number or percent of persons with disabilities.[49] Nor may colleges determine aid amounts based on category of disability, with some persons receiving more and others less.[50] However, a recipient may administer scholarships, fellowships, or other forms of financial assistance established under wills, trusts, or bequests that are awarded on the basis of factors that discriminate on the basis of disability (e.g., fewer persons with physical impairments receive nursing scholarships), assuming that the overall effect of the financial assistance is not discriminatory.[51]

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[48] University of Chicago, 9 Nat'l Disability L. Rep. 245 (OCR 1996) (concluding that the University maintained proper grievance procedures, provided prompt and equitable resolution of complaints, and treated students similarly when they requested reinstatement).

[49] 34 CFR § 104.46(a)(1).

[50] McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990) (upholding a cap on financial aid as applied to a student with paraplegia, but finding the provision for greater levels of aid for students who were blind was in violation of § 504).

In applying for financial aid (as with admissions discussed earlier in the chapter), students with disabilities, like all other students, are responsible for completing appropriate forms accurately and honestly and for providing relevant data and documents in a timely fashion.[52] Failure to meet these requirements can result in the loss of eligibility. Furthermore, those receiving assistance must meet all legal eligibility criteria (e.g., that the successful applicant must be an undergraduate student[53] or has met academic requirements[54]). Prior history regarding the repayment of loans also may be considered in determining whether the applicant qualifies for additional support.[55] Repayment is expected, even if the loan was used to purchase an admittedly poor-quality education.[56]

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[51] 34 CFR § 104.46(a)(2).

[52] Columbia Coll., 8 Nat'l Disability L. Rep. 81 (OCR 1995) (concluding that a denial of financial aid was due to a student's failure to provide timely information and not due to her visual impairment); Ball State Univ., 3 Nat'l Disability L. Rep. 231 (OCR 1992) (finding that a student's request for financial aid was denied due to his failure to complete the appropriate forms in a timely manner and to make satisfactory academic progress, and not due to his emotional illness); El Centro Cmty. Coll., 2 Nat'l Disability L. Rep. 118 (OCR 1991) (finding that the denial of financial aid was due to computer error and the complainant's failure to complete the application process and not due to his learning disability).

[53] Berg v. Florida Dep't of Labor and Employment Sec., Div. of Vocational Rehab., 163 F.3d 1251 (11th Cir. 1998) (holding that a deaf student failed to support claim of discrimination when the state refused to fund law school; the plaintiff was unable to show that graduate education had ever been funded by the Division or that nondisabled students, who are not served by the Division, were some how treated better than those who were disabled).

[54] Boston Univ., 5 Nat'l Disability L. Rep. 114 (OCR 1993) (finding that the University did not discriminate against a student with a learning disability when the student was denied grants and a scholarship due to his failure to meet academic requirements; the student had his academic qualification assessed by a committee that included admissions officials and staff from the office of Learning Disability Support Services).

[55] Eastern Michigan Univ., 1 Nat'l Disability L. Rep. 187 (OCR 1990) (finding no evidence indicating that the denial of a short-term loan was due to a student's disability—multiple sclerosis; he had outstanding loans and failed to demonstrate the ability to repay).

[56] Louisiana Business Coll. v. Crump, 474 So. 2d 1366 (La. Ct. App. 1985) (concluding that the purchase of a poor quality of education did not amount to a failure to provide consideration).

Some financial aid-related complaints are filed when students with disabilities request an additional year or more to meet degree requirements and thereby exceed traditional aid limits (eight semesters for some aid programs). The courts have not been overly supportive of resulting claims, however, and have observed that simply knowing that a cap may have an adverse impact on the disabled, as well as others who may take or require additional time to complete degree requirements, will not by itself constitute discrimination. In fact, colleges clearly have the right to limit or cap funding (both in dollar amounts and in number of semesters of eligibility) in an effort to control expenditures and to financially assist a greater number of students, given limited financial resources.[57] What is important is that financial aid programs provide students with disabilities with an overall equal opportunity for financial support.

In an effort to provide equal access, it may be necessary for the college to make aid information accessible in a variety of formats (for example, Braille, tape recorder, paper copy, internet) or even to personally assist students in the completion and filing of forms. It is recommended that a representative from SDS meet with financial aid counselors to discuss alternative procedures as well as needed accommodations for specific students.

Also, it is important to note that in determining how much aid will be necessary, the amount of tuition and fees may not be greater for students with disabilities than they are for other students. Furthermore, no supplemental fees may be charged for accommodations, services, or devices required under disability law, although the student may be responsible for paying for services that exceed federal mandates (e.g., personal health care attendant, private tutor).

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[57] Traynor v. Turnage, 485 U.S. 535 (1988) (holding that veterans with primary alcoholism, classified by the VA as willful misconduct, were not eligible for educational assistance benefits beyond the typical ten years and that such denial did not violate § 504); McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990) (upholding a cap on financial aid as applied to a student with paraplegia); Murdy v. Bureau of Blindness and Visual Servs., 677 A.2d 1280 (Pa. Commw. Ct. 1996) (concluding that an undergraduate student who was blind was not eligible for financial aid beyond the eight semesters he received). *See also* Sam Houston State Univ., 4 Nat'l Disability L. Rep. 317 (OCR 1993) (finding that a student with an affective disorder had in fact been admitted to the University and had been eligible for some financial aid; no aid was utilized, however, because he did not enroll during the academic year he was declared eligible for aid).

Selected Sources of Financial Aid

To receive aid from one of the federal programs discussed in this chapter, the applicant must be a United States citizen (or eligible noncitizen); have a valid social security number; have a high school diploma, a general education development (GED) certificate, or equivalent credential; pass a test that has been preapproved by the Department of Education (a test for which accommodation may be provided); or meet other standards established by the applicant's state. Moreover, the applicant must be admitted to a degree or certificate program (i.e., not just be taking correspondence or telecommunications courses unless they can be counted toward degree requirements) and making satisfactory academic progress (i.e., the student must be earning a minimum of a 2.0 GPA and complete 75% of the number of credit hours attempted, 60% if a first-year student). To receive aid, the student must certify that the funds will be used only for educational purposes; that he or she is not in default on previous student loans; and that selective service registration has been completed (for American males eighteen to twenty-five years of age).[58]

Once the proper forms have been submitted, the information is verified through the appropriate federal agencies (such as, Social Security Administration, Selective Service System, Immigration and Naturalization Service, Department of Veteran Affairs). The student's name also is checked with the DOJ records to see if the applicant has been denied federal aid by the courts due to a conviction in a drug-related crime.[59]

In addition to the above, for the student to be eligible for federal aid, "financial need" must be established (except for unsubsidized Stafford, PLUS, and Consolidated loans). The formula used for this purpose establishes the "expected family contribution" (EFC), which reflects the ability of the student and the student's family to contribute toward his or her education. The EFC then is subtracted from the projected cost of enrollment (determined by the college's financial aid administrator), resulting in the student's financial need.

The EFC will include parental income if the student (1) is classified as a dependent (not twenty-four by December 31 of the award year), (2) is not married, (3) has enrolled in an undergraduate program, not in a graduate or professional educational program beyond a bachelor's degree, (4) has no legal dependents, (5) is not a ward of the court, and (6) is not a veteran. Assuming the parents have income, being "dependent" increases the EFC and thereby reduces the amount of aid for which the student is eligible.

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[58] *The Student Guide 2001-2002, General Information: Student Eligibility*, UNITED STATES DEPARTMENT OF EDUCATION, *at* http://www.ed.gov/prog_info/SFA/StudentGuide/2001-2/elig.html (2001).

[59] *Id.*

In an effort to increase aid amounts, students with disabilities, as well as other students, may claim special or unusual family circumstances (e.g., uncommonly high medical or dental expenses). If accepted, this will allow the student to identify exceptional prior year costs he or she may have incurred; such information would help reduce the level of EFC and thereby increase the amount of financial support to be received. Documentation should be provided to the college's aid administrator. This individual has final authority in assessing such circumstances and in determining eligibility status; there is no appeal to the Department of Education.

The student may additionally file a "cost of attendance" form, identifying exceptional costs of attending college. Depending on the nature and extent of disability, the student may need a health care attendant, an aide, a service animal, or other support within the college environment for which the student is responsible for funding. Although such additional costs do not reduce the EFC, they will help increase the projected costs of education and qualify the student for additional federal loans. If the student has already borrowed the maximum permitted, the data may assist the student in acquiring support from banks and other lenders.[60]

Selected Programs

The types of aid available to students include grants (do not require repayment), loans (must be repaid), and work-study (provides employment). The most common programs are briefly reviewed below and included in Table 5-1.

Pell Grants

These grants do not require repayment and are generally available only to undergraduates who have not earned a bachelor's or professional degree. (However, in some instances Pell Grants have been awarded to students attending a postbaccalaureate teacher certificate or licensure program.) Student eligibility is determined by formula, with the amount of the award (up to $3,300 in 2001-2002) based on financial need, the cost of education, part-time versus full-time status, and whether enrolled for a full academic year. The student can be attending college less than half-time and still receive aid, but on a prorated basis. For students with a high calculated financial need, a Pell Grant represents the foundation on which other aid is added.

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[60] Most students do not receive 100% aid and are responsible for a least a portion of their tuition costs. *See, e.g.*, Griffin v. Cameron Coll., 11 Nat'l Disability L. Rep. 274 (E.D. La. 1997) (concluding that plaintiff was not constructively denied admission to a medical assistant program based on her HIV status; in fact, the applicant was admitted but did not enroll because the school required all students to fund a portion of the costs of their education).

Supplemental Educational Opportunity Grants

This grant is available only to undergraduates and, like Pell Grants, does not have to be repaid. Students must be enrolled in at least six credit hours.

Perkins Loans

Loans under this federal program are available to students enrolled as undergraduates ($4,000 in 2001-2002) or as graduate or professional students ($6,000 in 2001-2002) for at least half-time or more and must be repaid with 5% interest, but with no loan origination fee. A Perkins Loan will be canceled in total if the recipient dies or becomes totally and permanently disabled. Partial or total cancellation can result when the recipient is, among other occupations, a full-time qualified professional provider of early intervention services for the disabled or a full-time service provider as a staff member in the educational component of a Head Start Program. Payments must begin nine months after the student is enrolled less than half-time.

Stafford Loans

These loans are available to both undergraduates and graduates and must be repaid. They may be acquired through either the Federal Direct Student Loan Program or the Federal Family Education Loan Program. They operate much the same, except under the former the loan is from the United States Government while under the latter it is provided by a private lender such as a bank or credit union. They can be either *subsidized*, where the federal government pays the student's interest between receiving the loan and when repayment commences, or *unsubsidized*. Only subsidized loans are awarded based on financial need. Amounts of aid are identified in Table 5-1—additional aid levels are possible if the student is independent or if a dependent student's parents are unable to acquire

Table 5-1
Federal Financial Aid Programs

Grants (Gift Aid, Does not have to be repaid)

Type	Amount	Who is Eligible
Federal Pell Grant	**$200-3,000**	**U.S. Citizens or permanent residents demonstrating financial need**
Federal Supplemental Educational Opportunity Grant (SEOG)	$600-1,200	U.S. Citizens or permanent residents demonstrating financial need; undergraduates

Loans (Self-help, Must be repaid)

Type	Amount	Who is Eligible
Federal Direct Subsidized Loan	**$2,365 for freshmen $3,500 for sophomores $5,500 for juniors and seniors, $8,500 for graduate students**	**U.S. Citizens and permanent residents with financial need**
Federal Direct Unsubsidized Loan	Same as above for students who do not qualify for subsidized loans. For independent students, an additional $4,000 or $5,000 per grade level	U.S. Citizens and permanent residents. Students who are not eligible for the maximum subsidized loan; Independent students
Federal Perkins Loan	**Average award $2,000**	**U.S. Citizens and permanent residents with financial need**
Federal Nursing Loan	Varies. Average amount $3,000	Students admitted to Nursing program, undergraduates
Federal Direct PLUS Loan	**Up to the cost of education less any aid received**	**Parents of dependent students**

Employment (Self-help, Funds are earned)

Type	Amount	Who is Eligible
Federal Work Study (FWS)	**Average for freshmen $1, 800, Continuing students $3,000**	**U.S. Citizens or permanent residents with financial need**
Graduate Assistantships	Varies	Students who are eligible for FWS, if not, students may have one funded through the individual department
University funded positions	Varies	**All undergraduate and graduate students**

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How to Apply	How Award is Determined
Submit FAFSA in early January 1999	Based on need according to federal formula
Submit FAFSA in early January 1999	Based on need according to federal formula, priority deadline

How to Apply	How Award is Determined
Submit FAFSA in early January 1999	Variable, 8.25% maximum. Repayment begins 6 months after student ceases half-time enrollment
Submit FAFSA in early January 1999	Variable, 8.25% maximum. Repayment begins 6 months after student ceases half-time enrollment; Interest accrues
Submit FAFSA in early January 1999	5% interest rate; Repayment begins 9 months after student ceases half-time enrollment
Submit FAFSA in early January 1999	5% interest rate; Repayment begins 9 months after student ceases half-time enrollment
Submit FAFSA in early January 1999	Variable, 9% maximum; Repayment begins 60 days after disbursement of loan

How to Apply	How Award is Determined
Submit FAFSA in early January 1999	Part-time, on- or off-campus
contact college department	Part-time, on- or off-campus
Apply directly to campus departments	Part-time, on- or off-campus

a PLUS loan. The student is responsible for paying up to 4% as a loan origination fee. The loan amount then is repaid, with up to 8.25% interest (set on July 1 of each year), beginning six months after the student fails to enroll for at least a half-time load (or longer if on active duty in the military).

PLUS Loans

These loans are available to parents with a dependent child in an undergraduate program at least half-time. The parents must be able to pass a credit check, be citizens of the United States, and not be in default of any of the student financial assistance programs. The amount of the PLUS loan may be no more than the cost of attendance (tuition and fees, books and supplies, room and board, transportation, and other miscellaneous expenses) minus other financial aid. Interest rates for these loans are variable but will not exceed 9% (also set each year on July 1). There is an origination fee of 4% that is deducted from the loan principal; the student will receive 4% less than the amount borrowed. Repayment is required within sixty days after the final loan disbursement for the academic year.

College Work-Study

This program is for both undergraduates and graduates who are at least half-time (i.e., six credit hours for undergraduates and four credit hours for graduates). It provides jobs at an hourly wage or salary rather than grants or loans for students who qualify for financial assistance. Compensation must be set no lower than the current federal minimum wage and often is higher, depending upon the skill or knowledge level needed to do the job. The total amount of money a student is able to receive depends on financial need when the applicant applies and the amount of money the particular college has for the program. Average funding for freshmen is $1,800 and for continuing students is $3,000.

Miscellaneous support

In addition to federal revenue, states and colleges have additional forms of student financial support—graduate teaching assistantships, graduate research assistantships, and scholarships specific to departments and majors. Some are based on financial need, while others are awarded based on criteria such as academic potential, GPA, test scores, major, or whether the student was a valedictorian in high school. Some private programs that do not receive federal financial assistance also provide awards based on race, gender, national origin, and disability, among other characteristics. [To do so in the public recipient sector, however, would violate the Fourteenth Amendment (all identified categories), title VI of the Civil Rights Act of 1964 (race, national origin), and title IX of the Education Amendments of 1972 (gender).]

Guidelines for the Practitioner

The following guidelines are recommended in the areas of admission and financial aid.

(1) Select admission requirements that will assist in the identification of those students who are most likely to succeed within the program and later in practice.

(2) Publish the identified requirements in the college catalogue, in brochures, and on the internet, as appropriate.

(3) Establish and publish admission procedures and timelines for the submission of materials.

(4) Provide physical assistance to those who are incapable of independently completing required materials.

(5) Follow the procedures in all instances and admit or deny based only on the published standards.

(6) Use multiple criteria in the admissions process and, ideally, use a form of holistic assessment, including both traditional and nontraditional data.

(7) Provide students with the opportunity to informally appeal an adverse admissions decision. Have persons other than those who made the original decision render a decision on appeal.

(8) Provide equal access to financial aid.

(9) Be sure to consider "special circumstances" and "costs of attendance" as factors in determining the level of aid that will be available to a student with a disability.

6

Accommodations and Modifications

Colleges and universities [hereafter referred to as colleges] may not exclude a student with a disability from any course, plan of study, or any other part of its education program or activity where the reason for such exclusion is the student's disability.[1] In providing students with disabilities equal access, it may be necessary to provide auxiliary aids or other accommodations, or make necessary modifications to existing academic requirements. Also, courses must be offered in accessible facilities (see Chapter 4) or other reasonable arrangements must be made (e.g., videotape, cassettes, prepared notes) that will provide students with disabilities with educational experiences comparable to those provided to students without disabilities. Accommodations and modifications must be available within a reasonable period of time (ideally before classes begin),[2] assuming sufficient documentation of a qualifying disability and the need for a particular service.[3]

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[1] 34 CFR § 104.43(c).

[2] Lane Cmty. Coll., 12 Nat'l Disability L. Rep. 276 (OCR 1997) (holding that the College violated neither § 504 nor title II of the ADA when it provided the requested accommodation—i.e., computer-assisted notetaker—to a student with hearing impairments within ten days; the previously provided accommodation (i.e., FM implant patch system) proved inadequate); Whittier Coll., 7 Nat'l Disability L. Rep. 187 (OCR 1995) (finding that although the College was not timely in providing a learning-disabled student with a notetaker and a computer with spell check, no § 504 violation resulted given that the mid-term examination grades and grades on quizzes were not considered in the student's final grade; moreover, class notes were timely provided to enable the complainant to study for the final); Western Oregon State Coll., 2 Nat'l Disability L. Rep. 93 (OCR 1991) (determining that the College failed to provide students with requested auxiliary aids without delay and interruption; also, the students had requested that the interpreters use a different sign language than that provided, but such request was not accommodated).

[3] Northwestern Coll., 6 Nat'l Disability L. Rep. 261 (OCR 1995) (finding that a student who had requested oral testing, given his documented learning disability, failed to provide sufficient and timely evidence that he had a condition requiring such an academic adjustment); Cumberland Cmty. Coll., 6 Nat'l Disability L. Rep. 418 (OCR 1994) (determining that the College did not violate either § 504 or title II of the ADA by refusing to allow a student to take weekly tests in all courses rather than mid-term and final examinations; the student had a remote memory deficiency, but her evaluations did not support the need for the requested evaluation); University of Alaska Anchorage, 5 Nat'l Disability L. Rep. 39 (OCR 1993) (holding that the University had offered a student with a learning disability the option of having extended testing time

Documenting the Disability

As discussed in Chapter 2, unlike K-12 schools under the Individuals with Disabilities Education Act (IDEA), colleges are not responsible for assessing students purporting to have physical or mental disabilities, and officials need not prepare individualized education programs (IEPs); provide an annual review of IEPs; or re-evaluate every three years. At the higher education level, the student has the responsibility to submit the appropriate documentation that will support the existence of a disability that substantially limits a major life activity, to identify what the physician, psychiatrist, or other appropriate professional considers reasonable accommodations and modifications necessary for the student to participate in the college's programs, and to request accommodation.[4] Materials should be completed thoroughly and submitted timely to enable officials time to determine eligibility and to coordinate resulting services, if any.[5] No accommodations have to be provided to students who fail to qualify as disabled or to those who do not attend class.[6]

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once it received documentation from the complainant's physician); Georgia Coll., 3 Nat'l Disability L. Rep. 304 (OCR 1992) (holding that a student with a learning disability was given extra time to take a Regent's Test, but that additional adjustments were denied given that the student did not comply with repeated requests that a comprehensive evaluation be provided to document the nature and extent of the disability).

[4] New York Univ., 3 Nat'l Disability L. Rep. 381 (OCR 1992) (holding that a student with dyslexia received some academic adjustments but failed to receive others because he failed to follow appropriate procedures; moreover, the services that were provided to the student were adequate); University of Pennsylvania, 1 Nat'l Disability L. Rep. 323 (OCR 1991) (holding that the evidence did not support complainant's allegation that the University failed to provide her with adjustments due to her cardiac dysfunction; the student had failed an examination three times, had never requested accommodation, and could have avoided even taking the examination which proved stressful by taking additional coursework).

[5] San Diego Mesa Coll., 10 Nat'l Disability L. Rep. 199 (OCR 1996) (finding that an applicant to a physical therapy assistant program failed to provide the College with sufficient timely notice to enable it to provide for the needed adjustments during the interview process; the applicant first requested modification in the interview process several days after the interview had been completed).

[6] North Carolina Cent. Univ., 6 Nat'l Disability L. Rep. 205 (OCR 1994) (holding that the University had provided necessary accommodations for two English classes, but that the student's failure to attend a chemistry class was the basis for the failure to provide accommodations in that setting); University of New Mexico, 4 Nat'l Disability L. Rep. 297 (OCR 1993) (finding that the requested accommodation for an alternate testing site and exemption from participation in group assignments would have been provided had the student not withdrawn from his courses prior to the testing dates).

Failure to properly document a qualifying disability was the central issue in *DuBois v. Alderson-Broaddus College*,[7] where the plaintiff with an alleged learning disability claimed that the institution failed to accommodate him while he was a student in the College's physician assistant's program. The plaintiff had submitted materials that were inconclusive (e.g., one stated that he "might" suffer from a specific learning disability) and had not taken the appropriate corroborating tests. Notwithstanding this failure to properly document, the College agreed to administer tests orally, to provide extended time for test-taking, and to grant a one-day extension to perform written projects. In granting summary judgment to the defendant, the court noted that even if the plaintiff had a learning disability, which the court concluded he did not, he nevertheless was accommodated properly. Faculty were not required to allow him to retake examinations, to permit him the opportunity to earn extra credit, or to create additional days where clinical performance examinations could be held.

In the determination of eligibility, colleges may not arbitrarily require unrelated or redundant testing or accept assessments only from professionals with unnecessarily high level credentials (e.g., to accept documentation only from a psychiatrist when a psychologist is sufficiently trained and licensed to provide the needed assessment).[8] Professional practice will determine the need for retesting (if ever) and the need for more recent or different assessments. If the student fails to qualify for services and is denied accommodation, the college should provide procedures permitting an appeal of the initial decision. The hearing officer may be employed by the college, but should be a disinterested third party with the credentials necessary to make an appropriate, reasoned, and informed decision. A college administrator without the proper training, degrees, or licensure should not make this type of determination. It is difficult to deny the recommendations of a trained professional in learning disabilities when the denial is based on the opinion of an SDS staff member with perhaps limited or no training in any related field or an administrator with degrees in higher education administration, student personnel, or business, but perhaps only superficial knowledge of adult assessment or disabilities.

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[7] DuBois v. Alderson-Broaddus Coll., 950 F. Supp. 754 (N.D.W. Va. 1997).

[8] Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997) (concluding that the University had discriminated against students with disabilities when it required retesting of all students every three years; mandated that the persons responsible for testing have doctoral-level training in specific fields; and failed to provide a meaningful appeal of a denial of services).

Where the student is found not to have an impairment, or the impairment does not qualify as a disability, assistance from the college still may be forthcoming. Many, if not most, colleges today make available a limited number of services or opportunities that would qualify as accommodations had the student been "disabled" (e.g., tutoring, counseling, permission to tape record). Where students who fail to qualify as disabled are provided with such services, it is important that officials make the recipient aware that the services are not mandated by the Americans with Disabilities Act (ADA) or the Rehabilitation Act (RA), but rather are provided consistent with the college's mission. In this way, the student is less likely to develop a feeling of entitlement if existing services were terminated or requests for future assistance were denied.

On the other hand, if the student is found to qualify as disabled, the college then must determine whether accommodations and modifications are necessary and, if so, which ones and to what degree. This process should involve both SDS staff and the student. In that effort, several courts have argued that college officials have a "duty" to investigate alternative accommodations that are available.

Duty to Investigate

Nowhere in federal statutory or regulatory law is it made clear how far a college must go to explore alternative accommodations, technologies, services, and the like. Additionally, although the courts tend to favor the implied *duty to investigate*, they nevertheless are divided as to congressional intent.[9] Even though many students have extensive knowledge of their own disabilities, teaching methodologies, learning styles and strategies, assistive technologies, and college procedures, some operate without the wherewithal to present their cases effectively or to negotiate successfully.[10] Given this reality, if there were no duty or responsibility of officials to identify available and realistic options, colleges then would be required to select only from among those accommodations and modifications requested by the student that were supported by the documentation and found reasonable. This process would surely limit expenditures but also could operate to restrict meaningful access to college programs by otherwise-qualified students. To demonstrate good faith compliance, it would be prudent to identify available options and to consider the feasibility of each. It is unlikely, however, that the courts will expect college personnel to be "cutting edge," familiar with experimental technologies, or responsible for creating, inventing, or developing new strategies or devices. *Knowledge of that which is generally known to informed professionals* seems to be a worthy goal and will most likely be sufficient to satisfy both the law and the courts.

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[9] *See, e.g.*, Ohio Civil Rights Comm'n v. Case Western Reserve Univ., 666 N.E.2d 1376, 1387 (stipulating that there is no duty to investigate); Massachusetts Coll of Pharmacy, 1 Nat'l Disability L. Rep. 369 (OCR 1991) (finding that the student with genitourinary problems never identified any specific adjustments to accommodate his disability; accordingly, when none was provided no violation existed). *But see* Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 796 (1st Cir. 1992) (determining that the University had the obligation to consider available ways of accommodating a student with a disability); Nathanson v. Medical Coll. of Pennsylvania, 926 F.2d 1368, 1383 (3d Cir. 1991) (identifying the implied duty to investigate).

[10] DePaul Univ., 4 Nat'l Disability L. Rep. 157 (OCR 1993) (holding that the University failed to properly consider the re-admission of a student with learning disabilities; the University should have consulted an expert in learning disabilities and discussed whether new learning strategies and effective academic adjustments could have been used).

Discretion/Deference

As discussed in previous chapters, although courts have the responsibility to determine whether colleges have demonstrated compliance with federal disability law, they generally give deference to the judgments of educators,[11] assuming good faith compliance, the use of professional judgment, and the production of proper and sufficient documentation. To demonstrate a good faith effort, college officials should examine all documents and other information contained in student files and discuss with each student the need for accommodation. Alternative procedures and methods that could be used to address those needs should then be reviewed. Student preference must be considered when selecting from among alternatives[12] (e.g., that access to MacIntosh computers be available, given the student's experience working with that brand of computer and its accompanying software[13]), although such preferences are not controlling. College personnel have the authority to select among effective, appropriate, and reasonable accommodations and modifications.[14] Those that are identified need to address the limitations imposed by the disability and should not be selected simply because they may prove beneficial to, or are requested by, the student.

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[11] Christian v. New York State Bd. of Law Exam'rs, 899 F. Supp. 1254 (S.D.N.Y. 1995) (dismissing plaintiff's claim that accommodations were necessary to take the state bar examination—he had already passed the test; as a rule, however, determinations made by the Board regarding accommodations were entitled to some deference).

[12] 28 CFR § 35.160(b)(2). In determining what type of auxiliary aid and service is necessary, a public entity is required to give primary consideration to the requests of the individual with disabilities.

[13] St. Louis Univ., 1 Nat'l Disability L. Rep. 259 (OCR 1990) (concluding that, when the University provided a learning-disabled student access to its IBM computer lab and six weeks later provided the requested Macintosh computer, it had provided effective auxiliary service).

The Ninth Circuit in *Hoffman v. Contra Costa College* reviewed the issues of student preference and "demand"[15] in 2001. The appellant suffered from multiple sclerosis and requested and received a variety of accommodations, including a quiet place and additional time to take examinations and permission to use a formula sheet during mathematics courses. Her professor provided for the aforelisted accommodations that had been agreed to by the Disabled Students Program and Services Office (DSPSO), but denied her additional request to use personal notes and materials while taking tests. The student claimed that this refusal violated her ADA rights and that her professor had usurped the role of DSPSO. The DSPSO then changed her course section to one where her notes could be used. Now she claimed that this, too, violated disability law as she had the right to take the mathematics section that best fit her schedule. Upon review in court, the Ninth Circuit concluded that plaintiff's suit rested on a misunderstanding of disability law; such law did not create absolute rights to any and all accommodations beneficial to and demanded by the student. Colleges are not required to provide the "best" education possible; they are required only to make reasonable accommodation. The court noted that, in the present case, no trier of fact could find that the College failed to accommodate the student; in fact the court concluded that it had already granted "more" than a reasonable accommodation.

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[14] Herdman v. University of Illinois, No. 96 C 8025, 1998 U.S. Dist. LEXIS 17447 (N.D. Ill. October 26, 1998) (concluding that a medical student had been provided with reasonable accommodation and that his failure had little or nothing to do with his alleged disability; the student had claimed that the accommodations he received were no different than those provided other students with academic difficulties regardless whether they were disabled, but failed to show that the level of accommodation would not qualify as reasonable); Nova Southeastern Univ., 7 Nat'l Disability L. Rep. 27 (OCR 1995) (finding that although the University refused to provide a blind student with a PC-based reader—scans written material and reproduces it in spoken words or Braille—it had provided sufficient accommodations; the court concluded that the University had discretion in how it would accommodate the plaintiff, but that such accommodation had to be appropriate and effective).

[15] Hoffman v. Contra Costa Coll., No. 00-15655, 2001 U.S. App. LEXIS 24398 (9th Cir. Nov. 7, 2001).

Furthermore, although students may have disability classifications that are similar, their individual needs may differ markedly. All too often a predetermined set of accommodations is provided to all students within a particular category (e.g., learning-disabled students routinely receive additional time to take tests even when their disability is not in reading and a distraction-reduced environment even when submitting professionals have not identified the student's surroundings as a potential problem) without sufficient consideration of their individual needs. This approach may result in the provision of ineffective adjustments or in providing the student with a disability an unfair advantage. A number of factors may play a role in this process: referrals from practitioners who have limited knowledge of accommodation options; complexity of understanding and differentiating impairments and disabilities; difficulty of identifying the combination of accommodations that will result in a generally equal opportunity; inadequate training of SDS staff in the areas of assessment, technology, and disability; and an insufficient budget to permit the hiring of assessment experts and the purchasing of assistive technologies.

Also of relevance is the fact that colleges are not required to provide more expensive accommodations when less expensive, yet appropriate, ones are available; nor is it required to provide every possible beneficial service when fewer but effective services adequately address the student's disability.[16] Colleges simply are not required to maximize student potential; although this is a laudable goal, it is unrealistic to anyone with a budget. If an administrator were to establish "maximization" as an actual expectation of SDS staff, he or she will likely appear naive, if not disingenuous. Presumably, most people are less interested in hyperbole and prefer realistic goals and solutions. In review of related cases where the selection of effective accommodations is disputed, the courts typically give deference to college officials when the use of professional judgment can be substantiated; this tendency makes it difficult for plaintiffs to prevail in such cases except where seemingly flagrant violations exist.

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[16] University of Alaska Fairbanks, 3 Nat'l Disability L. Rep. 268 (OCR 1992) (concluding that although only one of three libraries on campus included a telecommunication device for the deaf (TDD), access could be achieved by telephone through a relay service offered by a local long-distance carrier; this alternative method provided for effective access, thus resulting in no § 504 or title II violation).

In most instances, student disabilities are well documented and requested accommodations are justified; on some occasions, however, student documentation is inadequate or expectations/demands are extreme, if not ridiculous (e.g., demanding that a master's program be provided through distance learning when such an option did not exist[17]; requesting that the accommodation of "continuous absences" be approved[18]). These cases represent the exceptions, however, as effective accommodations and modifications are routinely provided throughout higher education to enable students with disabilities to enter and participate in the college setting.

Accommodations and Modifications

Depending on the size of the college, dozens or even hundreds of students will seek accommodations and modifications within a given academic year. Service delivery may require the involvement of multiple parties, departments, agencies, and faculty;[19] the completion of extensive paperwork; and the appropriation of the necessary funds to allow for effective and timely administration. Once a disability has been substantiated, the college is responsible for providing accommodations unless such provision would result in undue hardship (i.e., significant difficulty or expense) or fundamentally alter the nature of the educational program.[20] However, even if provision of a particular aid or service would result in hardship or fundamental alteration, the college still must provide an alternative aid, service, or adjustment, if one exists, that would not result in adverse impact. Selected accommodations and modifications are reviewed in more detail on the following pages.

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[17] Maczaczyj v. New York, 956 F. Supp. 403 (W.D.N.Y. 1997) (concluding that the College was not required to provide the plaintiff with a distance learning program).

[18] Fresno City Coll., 13 Nat'l Disability L. Rep. 30 (OCR 1998) (concluding that the complainant with irritable bowel syndrome was permitted to sit near the door and given leniency regarding absences up until the time he ceased attending class; however, no § 504 or ADA violation existed when the student was denied the adjustment of "continuous absences").

[19] San Jose City Coll., 12 Nat'l Disability L. Rep. 193 (OCR 1997) (finding that, although academic adjustments of double time for examinations and permission to take examinations in the Office for Student Disability Services had been approved, an instructor had failed to provide either accommodation; as a result, the College was found to have violated both § 504 and the ADA); Columbia Basin Coll., 7 Nat'l Disability L. Rep. 188 (OCR 1995) (finding that an instructor violated § 504 and the ADA when he repeatedly and publicly asked the plaintiff for reassurance that she understood his instructions; the student had a visual disorder and a learning disability).

[20] 42 U.S.C. § 12182(b)(2)(A)(ii); 28 CFR § 36.303(f); 28 CFR § 35.130(b)(7).

Auxiliary Aids and Other Accommodations

There are literally dozens of possible auxiliary aids and other accommodations that may be requested by students (e.g., interpreters, notetakers, use of a secretary to serve as an amanuensis to record answers, transcription services, written materials, telephone handset amplifiers, assistive listening devices and systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices (TDDs), videotext displays, qualified readers, taped texts, audio recordings, Braille or large print materials, adaptation of classroom equipment[21]). Some will prove reasonable, others will not. Moreover, some students will possess disabilities that simply cannot be accommodated.[22]

Transcriber and use of a tape recorder

At times it may be necessary to provide transcriber services or to allow the student to tape record a lecture or even a course.[23] Although the student should seek faculty permission prior to tape recording, federal regulations specifically state that colleges may not prohibit the use of tape recorders in classrooms if the effect is to limit the participation of students with disabilities in the college's education program or activity.[24] The professor then would have to show that undue hardship would result if the student were allowed to tape. As would be imagined, identifying a hardship would be difficult in this instance. It is unlikely that a claim of classroom disruption would be sufficient to support such an allegation. Moreover, even if the professor were to copyright his or her lectures, an agreement with the student could be signed where said student would use the tapes only for course purposes and then agree to destroy them. This simple arrangement should resolve any perceived copyright injury the professor might argue.

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[21] 34 CFR § 104.44(d); 28 CFR § 35.104; 28 CFR § 36.303(b).

[22] Breece v. Alliance Tractor-Trailer Training II, Inc., 824 F. Supp. 576 (E.D. Va. 1993) (finding that no reasonable accommodation could be provided to enable an applicant to truck driving school to be otherwise qualified; the applicant was severely hearing impaired and would have posed a threat to public safety if admitted to the program; he had requested that a sign-language interpreter join him and his instructor in the cab of the truck so that he could glance around at the interpreter in order to understand instructions, questions, comments, and warnings); Lewis and Clark Coll., 5 Nat'l Disability L. Rep. 248 (OCR 1994) (determining that a student claiming disabilities related to silicone toxemia failed to provide the necessary documentation to qualify for accommodations; documentation did support, however, that claimant suffered from pathological daytime sleepiness, findings consistent with a diagnosis of narcolepsy, causing her to have difficulty in class, while studying, taking notes in lectures, participating in conversations, maintaining concentration, and short-term memory; but communication with the student's neurologist indicated that there was no reasonable accommodation appropriate to assist her in taking her law school examinations).

[23] University of Colorado, 4 Nat'l Disability L. Rep. 211 (OCR 1993) (concluding that the University should have provided a nursing student with rheumatoid arthritis with a tape recording transcriber or effective alternative; however, the student's dismissal was based on deficient academic performance rather than national origin or disability); State Univ. of New York, Alfred State Coll., 2 Nat'l Disability L. Rep. 102 (OCR 1991) (finding that the College had provided a student with Klippel-Feil syndrome, a craniofacial disorder, with appropriate adjustments—the use of a recorder and taped lectures).

As an alternative to the use of a tape recorder, some students may prefer the assignment of a transcriber. Factors to be considered would be the size of the classroom, the type of course, noise level in the class, distance from the professor, ability of the student to manually operate the recorder (both in class and for replay purposes), ability to hear, and auditory learning ability. Transcriber services also may prove beneficial in labs, libraries, and the like if necessary for the student to participate meaningfully in the educational setting. Such services are expensive, however, and are selected only when use of a recorder is unfeasible.

Taped and Braille text

A variety of students may require the use of taped texts due to limited vision, physical impairments, or learning disabilities.[25] Only a few books come in taped form; most will have to be converted.[26] Because the use of a taped text clearly substitutes for the purchasing of the bound text, a copyright fee will have to be paid in most instances. It is prudent to keep a copy of each book placed on tape so that a library of taped texts can be established and multiple use can occur (also requiring the payment of a fee). Where the service is provided it is important that the receiving student notify college officials so that the text can be converted prior to the beginning of classes. Once timely notice has been proffered, it is the college's responsibility to provide the service when needed.[27] The primary problem with providing this accommodation is, of course, cost. Reducing an entire textbook or even book of readings to a series of tapes will prove expensive or obligate extensive staff time. Also, it is unclear who will be responsible for the payment of the copyright fee. A good case can be made that the student should pay the fee, however, as he or she would have been responsible for the purchase of the book.

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[24] 34 CFR § 104.44(b). *See also* Thurgood Marshall Sch. of Law, 1 Nat'l Disability L. Rep. 305 (OCR 1991) (finding that there was no proof that the student had requested multisensory instruction, that the denial of the use of a tape recorder had been resolved in a prior investigation, and that the institution had committed no new violations of § 504; in the previous case, a professor's blanket denial of the use of recorders violated § 504).

[25] Oregon State Univ., 5 Nat'l Disability L. Rep. 220 (OCR 1994) (finding that the University had provided some taped texts, untimed testing, and extension of time to complete a written report and thus did not violate § 504 or the ADA); Fort Lewis Coll., 2 Nat'l Disability L. Rep. 198 (OCR 1991) (finding that, once college personnel were aware of a student's learning disability, appropriate adjustments were provided, including untimed tests; reduction in the number of required papers; taping class sessions; and provision of textbook cassettes); Mid-America Nazarene Coll., 2 Nat'l Disability L. Rep. 105 (OCR 1991) (finding that the University had provided taped texts, modified testing, and extended time for examinations; also, the student's poor grades were the result of poor classroom attendance and performance and not discrimination); State Univ. of New York, Alfred State Coll., 2 Nat'l Disability L. Rep. 102 (OCR 1991) (finding that the College had provided a student with appropriate adjustments—separate room for taking examinations, as much time as needed to complete examinations, tests administered by the College's center for learning assistance, taped texts, use of a recorder, taped lectures, an assigned

Similar claims can be made for Braille materials needed by students with vision impairments. Few books or education materials are published in Braille, but most materials can be converted through use of a scanner and Braille printer. As above, a copyright fee may have to be paid. Scanners are relatively inexpensive, but Braille printers are costly. Nevertheless, once the equipment has been purchased, daily use should not be cost prohibitive.

Integrated setting and accessible classrooms

Although separate programs or activities may at times be necessary (e.g., separate basketball participation reserved for those confined to wheelchairs; isolated testing at an alternative, distrac-

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reader, limited course load, and tutoring); University of Nevada at Las Vegas, 2 Nat'l Disability L. Rep. 17 (OCR 1991) (determining that a student with a learning disability had been provided with all adjustments and services supported by the evaluation—extended time for examinations, taped notebooks, a reader, scribe, a testing area for his examinations, and use of a graduate assistant).

[26] *But see* Spokane Falls Cmty. Coll., 11 Nat'l Disability L. Rep. 227 (OCR 1997) (concluding that a student with deafness had been properly accommodated and served by the College in regard to registration, new student orientation, and notification of course cancellation; moreover, the College was not responsible for translating written English into an ASL format given that there was no established method of doing so).

[27] Oregon State Univ., 5 Nat'l Disability L. Rep. 19 (OCR 1993) (concluding that tutoring services are of a personal nature and not therefore required under either § 504 or the ADA, but that the student should have been provided taped texts in a timely manner).

tion-reduced testing site), colleges may not deny a qualified person with a disability the opportunity to participate in its programs and activities[28] and must operate them in the most integrated setting appropriate.[29] Many times, all that is necessary to provide access to a regular college course classroom is the selection of an accessible building and classroom; the use of appropriate equipment, chairs, and tables; or assignment to preferred seating.[30] (See Chapter 4 for additional details on making buildings and programs accessible.)

In *Salehpour v. University of Tennessee*,[31] the Sixth Circuit was confronted with a somewhat unique case where a first-year dental student refused to comply with the policy of two professors that first-year students not sit in the last row of their respective classrooms. In spite of several warnings, the plaintiff refused to comply, stating all along that he preferred to sit in the last row as it permitted him to see better and to have fewer distractions, thereby increasing his concentration and enhancing his learning. He did not explain how sitting in the back of a class provided for fewer distractions, or why sitting even one row closer was injurious to his learning process. He was asked to leave the classrooms following his direct refusal to comply and eventually was subjected to internal disciplinary proceedings within the college. Following all levels of administrative appeals, the plaintiff was found guilty of a rules infraction and was given a severe reprimand to be placed in his record; moreover, he was required to apologize to the professors and students for the unnecessary disruptions of the classrooms and was placed on disciplinary probation. Rather than succumb in what he phrased a "power struggle" between him and his professors, he withdrew from the University and sued, claiming a range of civil rights and constitutional violations. Among his claims was one alleging disability discrimination.

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[28] 34 CFR § 104.4(b)(3); 28 CFR § 35.130(b)(2); 28 CFR § 36.202(c).

[29] 34 CFR § 104.43(d); 28 CFR § 35.130(d); 28 CFR § 36.203.

[30] Fresno City Coll., 13 Nat'l Disability L. Rep. 30 (OCR 1998) (concluding that the complainant with irritable bowel syndrome was permitted to sit near the door and given leniency regarding absences); San Jacinto Coll., 9 Nat'l Disability L. Rep. 246 (OCR 1996) (holding that a student with multiple alleged impairments was not denied accommodation in connection with registration; she had been provided a padded chair to accommodate her sciatica, special software, notetakers, tutors, and extra time for test-taking); University of New Mexico, 4 Nat'l Disability L. Rep. 297 (OCR 1993) (finding that front row seating was not provided the complainant in at least two classes, thereby violating § 504 and title II of the ADA); Western Int'l Univ., 1 Nat'l Disability L. Rep. 189 (OCR 1990) (finding that the University had discretion in appropriately meeting the needs of a hearing-impaired student; the student had requested a notetaker, while the University was willing to provide complainant with a tape recorder, seating in the front row, and a transcriber).

[31] Salehpour v. University of Tennessee, 159 F.3d 199 (6th Cir. 1998), *rehearing en banc denied*, No. 97-5468, 1998 U.S. App. LEXIS 31335 (6th Cir. Oct. 29, 1998), *cert. denied*, 526 U.S. 1115 (1999).

The plaintiff claimed to have had head, neck, and spinal problems that necessitated his being permitted to sit in the last row, although he never showed why one necessarily related to the other. Nevertheless, the court found this newly discovered civil rights violation to be "disingenuous, at best." University officials had no knowledge of his alleged disabilities until they received a letter from the plaintiff when he withdrew from the program. In this regard, the court concluded that the University must first know of the existence of a disability before it is found to have discriminated solely based on disability and that, although students have First Amendment speech and expression rights, such rights must be balanced against the compelling interests of college professors to educate in classrooms free of purposeless distractions. Given the above, the court affirmed the lower court's award of summary judgment in favor of the University.

Interpreter services

If a hearing-impaired, or in some instances a speech-impaired, student were to need a sign-language interpreter, and other less expensive, reasonable accommodations would not be appropriate, the college will need to provide the student with qualified interpreter services.[32] A qualified interpreter is one who is able to "interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary."[33] The interpreter should be provided within a reasonable time frame after request.[34] Although other resources (both public and private) at times may be tapped to bear some of the financial burden,[35] colleges may not refuse to hire an interpreter or provide any other accommodation under the guise that a government agency or alternative provider is responsible for payment.[36] Nonetheless, if the student regularly fails to attend class without just cause or prior notification when the interpreter has been paid and is present, the service may be terminated.[37]

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[32] New Coll. of California, 4 Nat'l Disability L. Rep. 264 (OCR 1993) (concluding that the College violated § 504 by failing to provide a hearing-impaired student with an interpreter); Roosevelt Univ., 3 Nat'l Disability L. Rep. 217 (OCR 1992) (holding that the University failed to adopt proper grievance procedures and failed to provide an eligible student with a sign-language interpreter); College of St. Scholastica, 3 Nat'l Disability L. Rep. 196 (OCR 1992) (finding a violation of § 504 when the College refused to provide a hearing-impaired student with a sign-language interpreter for use in a study-abroad program); St. Cloud State Univ., 3 Nat'l Disability L. Rep. 118 (OCR 1992) (finding that although some parts of a building were inaccessible to a complainant with physical disabilities and that there were some problems with scheduling notetakers and in retaining quality sign-language interpreters, the University was in compliance with § 504; arrangements were made for students to receive requested information that had been provided at inaccessible locations and the University was responsive to problems when they occurred); University of Maryland, 1 Nat'l Disability L. Rep. 36 (OCR 1990) (holding that the University violated § 504 when it failed to provide a student with a sign-language interpreter in a noncredit course).

At times, colleges have attempted to use notetakers rather than interpreters to accommodate a student's disability. Notetakers are particularly helpful to students who either have (1) vision impairments and materials are displayed on a blackboard, overheard, or video screen, or (2) manual dexterity limitations in their ability to write and extensive content is imparted during the class. But, use of notetakers fails to give hearing-impaired students the opportunity to interact with others in the classroom or to engage the professor directly. As a result, in many cases use of notetakers will prove inadequate.[38]

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[33] 28 CFR § 35.104; 28 CFR § 36.104.

[34] University of Massachusetts-Boston, 5 Nat'l Disability L. Rep. 483 (OCR 1994) (finding that the University had, in fact, provided a student with an interpreter within one week of the request, that a tutor had been provided after a brief delay, and that the plaintiff failed to substantiate the claim that the notes provided by the notetaker were unclear).

[35] University of Texas v. Camenisch, 451 U.S. 390 (1981) (finding that the issue of whether a preliminary injunction should have been issued by the lower court was moot, but that the issue of whether the University must pay for a sign-language interpreter remained and must be addressed on remand); Jones v. Illinois Dep't of Rehab. Servs., 689 F.2d 724 (7th Cir. 1982) (concluding that the primary responsibility to provide interpreter services for a deaf college student was placed on the IDRS); Schornstein v. New Jersey, Div. of Vocational Rehab. Servs., 519 F. Supp. 773 (D.N.J. 1981) (concluding that DVRS is responsible for interpreter services for a hearing-impaired college student), *aff'd*, 688 F.2d 824 (3d Cir. 1982); Barnes v. Converse Coll., 436 F. Supp. 635 (D.S.C. 1977) (upholding the plaintiff's right under § 504 to financial assistance in acquiring the services of a sign-language interpreter).

[36] St. Charles County Cmty. Coll., 1 Nat'l Disability L. Rep. 348 (OCR 1991) (concluding that the College had failed to properly accommodate a student with learning disabilities; a college may not refuse to provide an accommodation to a student merely because it believes that another agency or provider has the responsibility).

[37] University of California, Davis, 4 Nat'l Disability L. Rep. 108 (OCR 1993) (finding that suspending interpreter services because a student with a congenital hearing impairment had failed to timely sign an auxiliary aid agreement violated § 504 and the ADA; however, conditioning interpreter services on a student's attendance did not violate federal law).

Guidance and counseling

Colleges that provide personal, academic, or vocational counseling, guidance, or placement services to their students must provide them to students with disabilities on a nondiscriminatory basis.[39] Furthermore, when services have been agreed to, they need to be provided as stipulated within the agreement.[40] When providing advisement, counselors should not direct qualified students with disabilities toward more restrictive career objectives than is done for other students with similar interests and abilities. Notwithstanding this directive, it is important to provide factual, objective information about licensing and certification requirements that may present obstacles for students with disabilities in their pursuit of particular careers.[41] Students should be fully informed as to the knowledge, skills, and abilities that will be necessary for them to meet program requirements and to succeed later while on the job. Although some professors and others may feel that "learning for learning's sake" is goal enough, most people attend college to acquire the credentials necessary to gain employment upon graduation. The vagaries and harshness of the workplace are much different than the more politically correct, generally helpful, and perhaps even sensitized environment of higher education. Employers, particularly small, private ones, often are reluctant to provide workplace adjustments and accommodations and may even be viewed as less empathetic to the needs of the disabled. Moreover, employers overall will not be required to provide the same level of accommodation expected in higher education institutions, particularly from large public colleges. For example, it is unlikely that an employer will be responsible for hiring a full-time sign-language interpreter to accompany a single hearing-impaired employee throughout the day to facilitate communication or to purchase the necessary equipment to translate reading materials (handwritten as well as typed) into Braille to permit total access to files, memoranda, and other communications for one who is vision impaired. In such circumstances, either the employee will not qualify as "otherwise qualified" for the position or the requested accommodation will be found to result in employer hardship. Given these differences, it is advised that, in the identification of reasonable accommodations, SDS staff should select those that will enable the student to succeed in the workplace as well as in the classroom. Far too many students with disabilities earn degrees, but are underemployed after graduation; some are even unemployable. (See Chapter 10 for a thorough discussion of disability discrimination in employment.) Colleges in part are responsible for this dilemma; they also can be part of the solution.

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[38] City Colls. of Chicago, 3 Nat'l Disability L. Rep. 287 (OCR 1992) (concluding that the University's provision of a notetaker instead of a sign-language interpreter was inadequate for a student with a hearing disability; accordingly the University failed to provide effective educational auxiliary aids or services in violation of § 504).

[39] 34 CFR § 104.47(b). *See also* University of Massachusetts, 5 Nat'l Disability L. Rep. 322 (OCR 1994) (finding that the University counseling center was inaccessible; the University agreed to consider measures that would provide greater access and provided the student with a paging device and fax machine to facilitate her communication).

[40] Tuskegee Univ., 1 Nat'l Disability L. Rep. 226 (OCR 1990) (finding that the University failed to provide tutorial and counseling services as stipulated by the previous director of student services).

[41] 34 CFR § 104.47(b).

Service animals

Colleges may not prohibit the use of service animals on campus grounds or in campus buildings if such prohibition has the effect of limiting the participation of students with disabilities in the recipient's education program or activity.[42] "Service animal" includes any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including such functions as guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, pulling a wheelchair, or fetching dropped items.[43] Although colleges should modify their policies, practices, and procedures to permit the use of service animals on campus and in buildings, staff members are not required to supervise, feed, provide health services, or otherwise care for them.[44]

Testing

Tests administered by professors for the purpose of licensure, certification, or degrees must reflect a student's achievement, knowledge, ability, or other factor the test purports to measure, rather than the student's impaired sensory, manual, or speaking skills (except where those factors are the ones being measured).[45] The examinations must be offered in a place and manner accessible to persons with disabilities or an alternative, comparable arrangement must be made.[46] As necessary, appropriate auxiliary aids should be provided (e.g., taped examinations, interpreters or other effective methods of making orally-delivered materials available to individuals with hearing impairments, Braille or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions).[47]

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[42] 34 CFR § 104.44(b).

[43] 28 CFR § 36.104.

[44] 28 CFR § 36.302(c).

In addition to the accommodations identified above, students often request additional time to take an examination. This request is routinely granted for students with learning disabilities (particularly in reading) and manual dexterity deficits (particularly with essay tests).[48] However, there are occasions when "additional time" would not be reasonable and therefore could be denied. For example, when the student is learning disabled, but not in reading; when a medical student is required to quickly, but accurately, assess a patient during an emergency room clerkship; when a nurse trainee is responsible for assisting a surgeon during an operation; or when a person is preparing to be an air traffic controller and must make split second decisions and stay focused for hours at a time. For the accommodation of additional time to qualify as reasonable, it must be academically justified, given the nature and extent of the student's disability in tandem with the demands of the task to be accomplished. Provision of this adjustment may represent perhaps one of several that will enable the student with a disability to have equal access to the college's benefits; it should not, however, result in an unfair advantage or render resulting scores or performance measures meaningless.

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[45] 34 CFR § 104.44(c); 28 CFR § 36.309(b)(1).

[46] 42 U.S.C. § 12189; 28 CFR § 36.309(a).

[47] 28 CFR § 36.309(b)(3). *See also* Hood Coll., 12 Nat'l Disability L. Rep. 127 (OCR 1997) (finding that the College had provided extended test time, a separate test site, and use of a word processor with spell check and allowed the student to use a reader/scribe for examinations; allowing the student with a learning disability to use a calculator for math projects was not required).

[48] 28 CFR § 36.309(b)(2). *See also* Meridian Cmty. Coll., 12 Nat'l Disability L. Rep. 314 (OCR 1998) (finding no § 504 violation when a nursing student with a prosthetic arm was accommodated—i.e., extended time and the substitution of materials—in the taking of a critical examination but that, due to the failure of that examination, could be discontinued from the program); San Francisco State Univ., 10 Nat'l Disability L. Rep. 384 (OCR 1997) (concluding that the University properly accommodated a student with a seizure disorder when it provided him with double time on tests but that additional lab time should have been provided; alleged difficulty in scheduling the lab time and the fact that the lab grade was not used in calculating the final grade did not negate the fact that § 504 and title II were violated); Wheaton Coll., 7 Nat'l Disability L. Rep. 330 (OCR 1995) (finding that, because the College already had agreed to a course substitution; weekly meetings with a professor; preferential classroom seating; audio taping of lectures; and extended time on examinations, there was no § 504 violation); Skyline Coll., 4 Nat'l Disability L. Rep. 132 (OCR 1992) (finding that the College had provided each necessary testing modification for a student with a learning disability—unlimited time on two tests, take-home examinations, open-book examinations—and had not retaliated against the student for hav-ing filed a complaint); State Univ. of New York, Alfred State Coll., 2 Nat'l Disability L. Rep. 102 (OCR 1991) (finding that the College had provided a student with appropriate adjustments, including as much time as needed to complete examinations); City Univ. of New York, 2 Nat'l Disability L. Rep. 74 (OCR 1991) (finding that a student had been provided with extended testing time as an accommodation for dyslexia and that her C grade was based on nondiscriminatory criteria); Dearmont v. Texas A&M Univ., 2 Nat'l Disability L. Rep. 10 (S.D. Tex. 1991)

This issue was addressed in *D'Amico v. New York State Board of Law Examiners*,[49] where the plaintiff had requested an array of accommodations while taking her Bar examination, most of which had been provided. The plaintiff had a severe visual disability (marked myopia and bilateral partial amblyopia) with corrected vision of only 20/50 and 20/70 in her right and left eyes respectively. Her visual limitations made it difficult for her to read and worsened the longer she read. The defendant provided a large print examination and permitted her to bring a lamp and straight edge to a separate location where she took the examination in the presence of a proctor. She was given nine and one-half hours on the first day and nine hours on the second day (instead of the traditional six and one-half on the first day and six on the second day) to complete the examination and was permitted to write the answers on the test rather than transfer them to an answer sheet. The plaintiff failed

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(finding that the University failed to accommodate a student with dyslexia when taking a qualifying examination); University of Washington, 1 Nat'l Disability L. Rep. 85 (OCR 1990) (finding that a student with dyslexia had been provided adequate adjustments—extended time for assignments, advance provision of course materials, and examination assignment modifications; the professor appropriately provided the student with taped course materials but denied the request to complete course assignments in a sequence different from the rest of the class; the professor argued, and OCR agreed, that such an accommodation was unnecessary because the student could take as much time as was needed to complete related assignments).

[49] D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217 (W.D.N.Y. 1993).

the examination and registered once again, but this time requested the aforeprovided accommodations plus a four-day time period rather than the traditional two. Although this additional adjustment was denied, she was offered the use of an amanuensis to serve as a reader/writer and was permitted to select the actual examination times, notwithstanding the fact that the specific days for testing were assigned by the Board. The plaintiff found these accommodations unsatisfactory and sued, claiming a violation of the ADA. The court found that the Board itself lacked the expertise to make such a decision as to what was a reasonable accommodation for the plaintiff. Without expert testimony to balance that provided by plaintiff's physician, the court was compelled to rule for the plaintiff. Given the above, the court granted the motion for a preliminary injunction and ordered the defendant to provide plaintiff with a four-day testing period with six hours each day plus a one-hour lunch break. This case should encourage test and college administrators to consult with experts prior to accommodation and in preparation for litigation. Most students would be benefited from having additional time to take a test, frequent breaks, and additional testing days. It is one thing to adjust the uphill terrain to a level playing field; it is quite another for it to be tilted downward.

Another common request is for tests to be administered in a quiet, often segregated, testing area.[50] Students with a wide range of learning and physical disabilities as well as Attention-deficit Hyperactivity Disorder often will qualify for this accommodation.[51] As a general rule, SDS will provide distraction-reduced environments for students. Given the widespread occurrence of student cheating

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[50] Okaloosa-Walton Cmty. Coll., 3 Nat'l Disability L. Rep. 326 (OCR 1992) (finding that a student with a learning disability was provided a second chance to take an examination that she had failed; she was provided with extended time and an alternate testing site; she scored lower on the retake than on the original); San Francisco Cmty. Coll. Dist., 1 Nat'l Disability L. Rep. 162 (OCR 1990) (holding that the course instructor and department chair failed to follow procedures to provide academic adjustments when Disabled Student Services was denied the right to proctor a test).

[51] Northern Arizona Univ., 5 Nat'l Disability L. Rep. 284 (OCR 1994) (finding that a graduate student with a learning disability was provided with academic adjustments—extended test time, quiet testing area; there was no proof that the complainant had requested or was denied access to taped texts or was denied full-time status); University of Nevada at Las Vegas, 2 Nat'l Disability L. Rep. 17 (OCR 1991) (determining that a student with a learning disability had been provided with all adjustments and services supported by the evaluation—extended time for examinations, taped notebooks, a reader, scribe, a testing area for his examinations, and use of a graduate assistant).

(see Chapter 9), however, it is prudent to schedule the student at the alternative test site at the same time the test is being administered and to monitor closely.[52] Unless agreed to as an accommodation, the proctor for such exams should provide no more instruction or guidance than is provided by the professor in the classroom.[53]

In addition to the above, there will be times when students will request that they be able to take open-book tests (when the test is closed book for other students),[54] to take the test home to allow more time and fewer distractions (even though the test is timed and proctored in class),[55] to answer questions on the test rather than to transfer answers to a scantron page,[56] to alter the manner in which the examination is given (e.g., written v. oral),[57] or to substitute another format of the test for the one used in class (e.g., the supplanting of a multiple-choice test with one that is essay[58]). When colleges refuse these requested accommodations, their decisions are generally upheld, given the need to maintain standards and test/course integrity.

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[52] Everett Cmty. Coll., 10 Nat'l Disability L. Rep. 115 (OCR 1996) (finding that the College violated neither § 504 nor title II of the ADA when an instructor refused to allow a student with major clinical depression to take an examination in an unproctored setting; the professor had offered to allow her to take the test a day early or to take an incomplete for the course and make it up at a later date).

[53] Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994) (holding that the Seventh Amendment entitled a teacher, who allegedly had been discriminated against on the basis of her learning disability during the National Teacher Examination, to a jury trial; the ETS had offered a separate room, 50% more time, a script of the listening portion, and a special tape player that allowed the replaying of the listening portion at a slower rate with no vocal distortion; after failing the test again, she requested an untimed examination and the administration of the test by an examiner with whom she could interact—this request was denied). At the time of publication of this manuscript, the plaintiff had won only the right to a jury trial.

[54] Pima Cmty. Coll., 13 Nat'l Disability L. Rep. 31 (OCR 1998) (holding that the College violated neither § 504 nor title II by refusing to allow a student with a learning disability to take an open-book test; the instructor had offered to give the student additional time, a separate quiet room, a test reader/proctor, and the option of taking a short answer fill-in or a multiple-choice test).

[55] University of Massachusetts, 12 Nat'l Disability L. Rep. 315 (OCR 1998) (holding that the University was not required to permit take-home examinations or allow a student to work alone rather than participate in group work as was required of others; the claimant's failing mid-term grade was not due to discrimination, but to her failure to take the mid-term examination); University of Chicago, 3 Nat'l Disability L. Rep. 233 (OCR 1992) (holding that professors were justified in denying requests to take examinations at home; a ventilated room, darkened shades, and extra time were sufficient accommodations for a student with vision impairments).

[56] D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217 (W.D.N.Y. 1993) (noting that the plaintiff was permitted to answer multiple-choice questions on the test itself rather than on a separate computer answer sheet).

In *Wynne v. Tufts University School of Medicine*,[59] the First Circuit held that a former medical school student with cognitive deficits and weaknesses in processing discrete units of information, was not discriminated against when the school failed to offer him an alternative to a multiple-choice biochemistry examination. He already had been allowed to repeat first-year classes and was provided with tutors, counselors, notetakers, and other aids. Moreover, he was given permission to take make-up examinations in two courses he failed while retaking his first year. In reaching its decision, the court noted that the University "demythologized the institutional thought processes leading to its determination that it could not deviate from its wonted format to accommodate [the plaintiff's] professed disability."[60] Accordingly, the University was found to have properly evaluated available alternatives. The multiple-choice test was represented to be the fairest way to assess student mastery of biochemistry.

Personal attendants, aids, and tutors

Although colleges are responsible for making their programs accessible, they are not required to pay for personal attendants, health care providers, or general aids.[61] Neither are colleges required to provide students with personal devices (e.g., wheelchairs), individually prescribed devices (e.g., prescription eyeglasses or hearing aids), readers for personal use or study, private tutors,[62] or other services of a personal nature (e.g., assistance in eating, toileting, dressing).[63] In the alternative, it is common to provide students with lists of persons who may assist them. It is prudent to make some effort to initially screen applicants for the various lists and to have receiving students provide evaluations once their contractual relationships with the service providers has come to an end. These evaluations and letters of recommendation should be kept on file and made available to soliciting students. Furthermore, college counsel should help in the preparation of a disclaimer to attach to the lists distributed to students. The disclaimer needs to communicate the good faith role of the college in providing assistance to the student in his or her effort to identify qualified and reliable aids, but make clear that the college is not responsible for the job performance of the person hired.

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[57] DuBois v. Alderson-Broaddus Coll., 950 F. Supp. 754 (N.D.W. Va. 1997) (noting that one of plaintiff's experts recommended that he be provided with oral testing, in addition to a number of other accommodations).

[58] State Univ. of New York, 4 Nat'l Disability L. Rep. 432 (OCR 1993) (finding that the University had provided a number of accommodations and adjustments for a student with learning disabilities, including an alternate test location, extended time on examinations, information broken down into sequential form, and use of a tape recorder during lectures; the University refused to substitute essay examinations for multiple-choice examinations and that decision was upheld by OCR as neither the doctor nor the counsel recommended such an adjustment).

[59] Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993).

[60] *Id.* at 795.

[61] University of California, San Diego, 5 Nat'l Disability L. Rep. 163 (OCR 1993) (finding that the University was not required to pay for the personal attendant to push complainant's wheelchair).

Modifications

Under certain conditions, modifications may include changes in the length of time permitted for completion of courses or programs, substitutions for specific requirements, adaptations in how courses are conducted, or alterations in the manner in which materials are distributed (assuming, of course, that the proposed modification does not adversely affect program integrity).[64]

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[62] Robinson v. Hamline Univ., C4-93-2074, 1994 Minn. App. LEXIS 432 (Minn. Ct. App. May 10, 1994) (affirming summary judgment with prejudice in a case where a former law student with a mild reading disability alleged that the University failed to accommodate him by providing a personal tutor—the University had provided access to a learning disability tutor, permitted extended test times, made available a legal writing manual, and allowed the plaintiff to attend a series of four academic support lectures); Northern Arizona Univ., 5 Nat'l Disability L. Rep. 284 (OCR 1994) (concluding that the University was not required to provide a tutor; moreover, the student was discharged because of inaccurate reports, failure to attend staff meetings, and inappropriate behavior); Oregon State Univ., 5 Nat'l Disability L. Rep. 19 (OCR 1993) (concluding that tutoring services are of a personal nature and not therefore required under either § 504 or the ADA, but that the student should have been provided taped texts in a timely manner).

[63] 34 CFR § 104.44(d)(2); 28 CFR § 36.306; 28 CFR § 35.135.

[64] 34 CFR § 104.44(a). *See also* Darian v. University of Massachusetts-Boston, 980 F. Supp. 77 (D. Mass. 1997) (concluding that a pregnant student with related health complications qualified as disabled, but that the University adequately accommodated her by providing the option of an incomplete, permitting her to take patient records home, allowing her to see just one

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Course substitutions and waivers

Among the more controversial program modifications requested by students with disabilities are those to substitute one course for another[65] or to waive a required course outright.[66] In such instances,

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patient per clinical day, and not requiring her to climb stairs); University of Massachusetts at Boston, 2 Nat'l Disability L. Rep. 152 (OCR 1991) (determining that the University had provided a student with a neurological condition with a number of in-class modifications and accommodations—the professor repeated statements multiple times, the pace of in-class instruction and oral questions during testing were slowed, extra time was permitted for the student to respond in class, a special preparation session and a make-up examination were provided, and complainant was permitted to write answers in cursive as opposed to printing).

[65] Wheaton Coll., 7 Nat'l Disability L. Rep. 330 (OCR 1995) (finding that because the College already had agreed to a course substitution, weekly meetings with a professor, preferential classroom seating, audio taping of lectures, and extended time on examinations, there was no § 504 violation); Georgia Coll., 3 Nat'l Disability L. Rep. 304 (OCR 1992) (holding that a student with a learning disability received some academic adjustments and modifications and was allowed to substitute a computer science course for a foreign language requirement).

[66] St. Louis Cmty. Coll. at Meramec, 13 Nat'l Disability L. Rep. 61 (OCR 1998) (holding that the College violated neither § 504 nor title II by refusing to grant a waiver for an algebra course to a student with Attention-deficit Disorder and depression; there was no documentation supporting the existence of a specific learning disability that affected mathematics); Dartmouth Coll., 11 Nat'l Disability L. Rep. 277 (OCR 1997) (concluding that the College was not required to grant a retroactive language waiver—i.e., the student had already completed the language requirement when he was first diagnosed with a learning disability and had received a C+ which would now be included in his GPA); University of Texas at San Antonio, 7 Nat'l Disability L. Rep. 447 (OCR 1995) (finding insufficient evidence to support a claim of discrimination when a University refused to waive a requirement that a student pass a mathematics section of an examination for admission to a teacher certification program); Northern Illinois Univ., 7 Nat'l Disability L. Rep. 392 (OCR 1995) (determining that the University's failure to accept a D grade as fulfillment of a core competency requirement in math or to waive the requirement did not violate either § 504 or title II; the complainant had been provided with extra time for her examinations, peer-assisted learning, tutoring, an alternate testing date to allow for additional study time, and waiver of the requirement that students not be able to repeat a course more than two times); Bellevue Cmty. Coll., 7 Nat'l Disability L. Rep. 135 (OCR 1995) (finding that the College's procedures for assessing accommodation requests was inadequate and that it failed to show that its math requirement was an essential part of its program; as a result, a math requirement should have been waived for a student with a learning disability); Bennett Coll., 7 Nat'l Disability L. Rep. 26 (OCR 1995) (holding that the College was not required to waive a math requirement for a student with a documented learning disability in mathematics; the College successfully argued that the math requirement was essential to studying political science, the complainant's field of study, given that it increased analytical reasoning and problem-solving skills and enhanced the ability to interpret quantitative data); Indiana Univ. Northwest, 3 Nat'l Disability L.

the student often purports that he or she has a specific learning disability (e.g., math, reading) and should not, therefore, be required to take courses that either heavily rely on those abilities or result in poor grades assigned disproportionately to persons with their respective disabilities. From the faculty's perspective, however, such a demand only compromises the integrity of their respective programs and requires the unequal treatment of students. Faculty also have a problem accepting the fact that a judge may determine what may or may not serve as prerequisites and program requirements, notwithstanding the judge's foreseeable lack of expertise within the given field. Moreover, even if the challenged curriculum is the field of law (the area of expertise of the judge), why would a single judge practitioner be in a better position to make curricular decisions over the entire faculty of a College of Law? Clearly, this is tantamount to a violation of academic freedom and will lead to unmanageable "exceptions" and "exemptions" for every rule and requirement.

To avoid such intrusion by the courts, the faculty need to review all components of their respective programs and render informed professional judgment as to the inclusion of each prerequisite, requirement, and competency. Obviously, this will require a great deal of time to meet, discuss, and possibly research each element. Expect case law in this area to represent the range of possible decisions from deference to control.

Rep. 150 (OCR 1992) (finding that the University did not fail to make an academic adjustment for a student when it refused to waive its foreign language requirement; the requirement was considered essential to the degree); City Univ. of New York, 3 Nat'l Disability L. Rep. 104 (OCR 1992) (concluding that the University was justified in denying a request by a student with a learning disability and dyslexia to waive a mathematics course; the requirement was a long-established and essential component to the program; moreover, the student had been offered the use of a calculator, extended testing time, and auxiliary aids); Griffin Coll., 2 Nat'l Disability L. Rep. 187 (OCR 1991) (determining that an instructor was not required to eliminate a term paper requirement as it was an essential element of the course; the instructor already had eliminated three of nine required weekly assignments and provided assistance in writing the term paper and enlarged print materials; the student also failed to show that the use of a closed circuit television was a necessary adjustment); University of Maryland, 1 Nat'l Disability L. Rep. 346 (OCR 1991) (concluding that the University had reasonably accommodated a student with a learning disability by providing him with tutoring, extended examination time, an alternate location to take examinations, the use of video tapes, and instructor availability outside class; the University was not required to waive a math requirement); City Univ. of New York, 1 Nat'l Disability L. Rep. 244 (OCR 1990) (holding that the University need not waive a math requirement for a blind student who had cancer; the University had offered tutorial services and extended time to complete the course).

A related controversy eventually was resolved in *Guckenberger v. Boston University*[67] where requests had been made to allow substitutions for math and foreign language requirements. The University's refusal to adjust its policy was at least in part due to President Westling's attitude toward the provision of accommodations for students with disabilities, particularly those representing themselves as being learning disabled (LD). He had ordered that substitutions should not be made for math or foreign language and delivered public speeches denouncing the zealous advocacy of the learning disabilities movement. To help the audience visualize his argument, he created a fictitious (although factually based) character, Somnolent Samantha. She and her peers were characterized as "lazy fakers who undercut academic rigor" and those who evaluated them were identified as "snake oil salesmen" who overdiagnose the disability. Wrestling also expressed concern that students who were not LD might elect to fake the disability just to gain an edge. [Although no cases at Boston University were presented as examples of such fraud, it would not be difficult for an informed student to intentionally misrepresent his or her abilities so that a psychologist or other appropriately licensed individual, acting in good faith, would unwittingly provide an LD diagnosis and support the provision of accommodations and modifications—see Chapter 3.]

The court held for the student plaintiffs. College officials had established unnecessarily high requirements for the credentials of those performing assessments, failed to provide a legitimate appeal when accommodations and modifications had been denied, had persons without formal training in learning disabilities make decisions as to eligibility, used unfounded stereotypes and assumptions about students with disabilities, and failed to demonstrate that professional judgment had been used. The court referenced the 1992 case of *Wynne v. Tufts University School of Medicine* where the First Circuit proposed that when:

> the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost, and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring

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[67] Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997).

> substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.[68]

In a second Boston University case a year later on similar claims, the court came to an inimical decision and now concluded that the refusal to substitute for foreign language was rational (the math requirement was not challenged in this case). This time, Boston University was able to show that a discussion had taken place regarding the unique qualities of the foreign language requirement. Officials also identified who took part in the decision and showed that consideration was given to possible alternatives. Given that the University provided the aforementioned, it was found to have exercised professional judgment in its rejection of substitutions.[69]

Distance learning

There will be times when students with mental and physical disabilities (e.g., phobias, panic attacks, contagious diseases) will request permission to be absent from the regular classroom, given the stress or anxiety associated with being near others or given the risk he or she would pose to others if aggravated or if required to share the same physical environment. In *Maczaczyj v. New York*,[70] the plaintiff was a former drug addict and alcoholic who resisted taking medications. He suffered from severe panic attacks, anxiety, and a Social Phobia when forced to interact with others. When experiencing interaction, he became agitated, sweat profusely, and felt as though the walls were "caving in." For all practical purposes, he was admittedly "housebound" and relied on others for most of his needs. He had previously acquired a Bachelor of Arts Degree in Anthropology through Empire State College and applied for a Masters of Arts Degree in Liberal Studies, a program not available through distance education. In the alternative, the College indicated to the plaintiff that he would be able to have a friend or advisor accompany him to class, have access to a vacant room whenever he needed time alone, be excused from social functions associated with the program, and be permitted to select among seating options during residency. The plaintiff considered these accommodations to be ineffective as no amount of medication would permit him to meet class attendance requirements and to have face-to-face interaction. In the alternative, he requested that the college deliver the program via telephone. This option was rejected by the program, given that it would not permit the same opportunity to develop critical and analytical thinking skills or to display such skills through a range of communication modes. Working in groups and interacting in class, critical to individual growth and assessment, would therefore be impossible. Officials indicated that although the telephone permitted the transfer of information, it would be inadequate for other purposes. The court agreed and found the requested accommodation (distance education or a program delivered over the telephone) to be unreasonable, notwithstanding the fact that the plaintiff would not be able to participate in defendant's program without it. The College had done all that was necessary to attempt to make access possible.

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[68] Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (1st Cir. 1991).

[69] Guckenberger v. Boston Univ., 8 F. Supp. 2d 82 (D. Mass. 1998).

[70] Maczaczyj v. New York, 956 F. Supp. 403 (W.D.N.Y. 1997).

In addition to the above, students with physical disabilities also may request a distance program when access would be difficult or impossible (perhaps because of the lack of mobility or because of the health risk the student would pose to others or to self). Given the state of technology today (e.g., CU CME, V-tell, Polycam, WebCT, Learnlinc, Blackboard, Placeware), being provided a distant, but interactive setting is indeed possible. With large screens, cameras, computers, printers, scanners, and the necessary software, the student can feel like part of the class and can interact on a nearly equal basis. However, such a request, where the technology is not in place and/or where the materials have not been developed would easily result in undue hardship for any size college. Such programming is expensive and requires extensive allocation of professor and technician time. Moreover, many degrees, licenses, or certificates require activities, projects, internships, and the like where students must interact with one another away from the distance-learning classroom. Where such requirements are found to be essential to the program, they need not be waived for any student, including those with disabilities.

Extra Credit

All students can be expected to meet the same academic standards in regard to quality and quantity of work. No federal law requires the lowering or elimination of academic standards found to be necessary for program integrity. Accordingly, officials may deny a student's request to submit extra credit, when such an option is not available to others.[71]

Guidelines for the Practitioner

The provision of reasonable accommodations is fraught with complications. Appropriately meeting each qualifying student's needs is a difficult proposition at best. It is more likely that any given student will either be overaccommodated or underaccommodated and that his or her actual disabilities, if any, will be understood only in the broadest of terms. Too little is known about individual differences (whether mental or physical) and that which is known is decidedly more complex than perhaps can be understood by most SDS staff, even with specialized training. In regard to mental disabilities, particularly learning disabilities, fraud can play a role, as the student who desires accommodation can easily influence test scores and performance assessment criteria. Given the above, do not assume that a perfect system exists today, or will exist tomorrow. Instead, the goals of compliance and nondiscrimination seem more realistic. To accomplish these goals, the following guidelines are recommended:

(1) Assess student documentation that allegedly supports the existence of a disability

(2) When the documentation fails to support a disability, inform the student of the need for additional documentation or, in the alternative, identify the services that can be made available to students without disabilities.

(3) When documentation supports a disability, confer with the student to discuss available options that will address the identified limitations. Also consider the opinions of the experts who submitted documentation on behalf of the student.

(4) In the selection of reasonable accommodations, be sure that one or more SDS staff has *knowledge of that which is generally known to informed professionals.*

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[71] DuBois v. Alderson-Broaddus Coll., 950 F. Supp. 754 (N.D.W. Va. 1997) (concluding that a student in a physician assistant's program failed to show that his requests to earn extra credit and to retake examinations represented reasonable accommodations).

(5) Remember that college staff retains the authority to select among reasonable accommodations; availability, cost, and feasibility can be considered in selecting among *effective* alternatives.

(6) Maintain program integrity when selecting modifications; remember that the elimination of essential requirements or the lowering of standards is not required.

(7) Permit the student to appeal both eligibility and accommodation decisions to a disinterested third party appointed by the college.

(8) Seek financial assistance from government agencies and other resources.

(9) Accommodations, even if necessary for student integration into the program, that result in financial or administrative hardship or cause a fundamental alteration of the program need not be provided.

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Student Records

Colleges and universities [hereafter referred to as colleges] maintain a wide range of records for current and former students (e.g., admissions, financial aid, grades, police, medical). In addition to those retained for all students, students with disabilities also have records associated with testing, proof of disability, and requests for and provision of accommodations. Access to administrative, program, and professor records could prove critical in documenting whether accommodations have been provided and are successful, and whether the student is otherwise qualified for matriculation. This chapter reviews federal law dealing with student records and includes discussion on (1) what constitutes a student record; (2) student access of personal records; (3) release of records to third parties; (4) access when student permission is not required; and (5) the right to amend records. Prior to examining the aforementioned issues, a brief review of related laws is provided. A list of recommendations for college practitioners concludes the chapter.

Related Laws

Most complaints alleging records violations are based on the Family Educational Rights and Privacy Act of 1974 (FERPA),[1] although 42 USC section 1983[2] and related state laws also are used. Each is briefly reviewed below.

Family Educational Rights and Privacy Act

Foremost among laws regulating student records is FERPA (also referred to as the Buckley Amendment). This law applies only to educational institutions that are either direct or indirect recipients of federal financial assistance made available by the Department of Education.[3] To qualify as a direct recipient, the college needs to receive a grant, cooperative agreement, contract, subgrant, or subcontract. The college is an indirect recipient if its students receive monetary benefits such as federal grants, loans, or work-study (e.g., Pell Grants, Guaranteed Student Loans).[4]

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20 USC § 1232g, 34 CFR part 99.

[2] 42 USC § 1983.

[3] 20 USC § 1232g(a)(3); 34 CFR § 99.1(a).

[4] 34 CFR § 99.1.

Although there is no private right of action under FERPA (i.e., a student lacks standing to bring suit exclusively under this law),[5] a student may file a complaint with the Family Policy Compliance Office (FPCO) in the United States Department of Education. A 180-day statute of limitations applies for filing complaints. The limitations period begins on the date the violation allegedly occurred or when the student knew or reasonably should have known of the violation.[6]

There is no actual hearing when FERPA-based complaints are filed. Instead, FPCO notifies the college of the allegations and requests a written response. It then investigates the complaint, determines whether an infraction has occurred, and notifies the parties of its decision, including instructions on how to rectify the situation if the allegation is supported. The Secretary of the Department of Education may initiate proceedings to withhold federal funds or terminate eligibility for future funding if a pattern of violations has been proven and the college still has refused to amend its practices, notwithstanding DOE efforts to compel compliance (e.g., a cease-and-desist order). Prior to the termination of financial support, it must be shown that compliance cannot be secured through voluntary means.[7] Furthermore, assuming that FERPA violations were the result of unauthorized individual action contrary to established policy, those persons responsible for the infraction may be subject to disciplinary action, even termination.[8]

42 USC Section 1983

Although there is no explicit right of action within FERPA, some courts have accepted the position that a related action may be brought under section 1983[9]—see detailed discussion in Chapter 1.

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[5] Fay v. South Colonie Century Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986) (finding no private right of action under FERPA in a case where a father was denied access to his children's educational records); Girardier v. Webster Coll., 563 F.2d 1267 (8th Cir. 1977) (concluding that students could not sue a private college under FERPA for failure to issue copies of their official college transcripts due to the failure to pay student loans that had been discharged in bankruptcy).

[6] 34 CFR § 99.64(c).

[7] 20 USC § 1232g(f).

[8] Henderson v. Huecker, 744 F.2d 640 (8th Cir. 1984) (upholding the termination of an employee for publicly releasing confidential student information).

[9] *See, e.g.*, Cullens v. Bemis, No. 92-1582, 1992 U.S. App. LEXIS 30892 (6th Cir. Nov. 18, 1992), 979 F.2d 850 (6th Cir. 1992) (unpublished decision); Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir. 1990). *But see*, Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996) (dismissing § 1983/FERPA claim given congressional intent to administratively correct systemic, rather than individual, violations where policy or practice encouraged or permitted unlawful release or failed to permit required release), *aff'd without published opinion*, 114 F.3d 1172 (3d Cir. 1997).

Plus, at least one court also purports that exhaustion of administrative remedies under FERPA is not required prior to filing suit.[10] To prevail under this law, the plaintiff needs to show that he or she has been deprived of a federal constitutional or statutory right (in this instance a FERPA right); that a person "acting under color of state law" was responsible for the deprivation;[11] and that the college engaged in a custom, pattern, or practice of either disclosing information to unauthorized third parties or denying access to eligible students and parents. An independent, unilateral action by a nonpolicymaker will be insufficient to establish a violation.[12] Note that students in private colleges are unable to vindicate their rights in federal court under either FERPA, because there is no private right of action, or section 1983, because it applies only to state actors.[13] Section 1983 suits may be limited, however, as it is possible that the Eleventh Amendment[14] will prohibit claims for monetary damages,[15] supervisors and employers are unlikely to be found liable under the doctrine of *respondeat superior*[16] for violations of subordinates, and simple negligence[17] in all likelihood will be insufficient to support a successful claim.

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[10] Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992).

[11] Cullens v. Bemis, 979 F.2d 850 (6th Cir. 1992) (unpublished decision) (dismissing one of the defendants in a FERPA/§ 1983 suit given that the defendant was private); Odom v. Columbia Univ., 906 F. Supp. 188 (S.D.N.Y. 1995) (determining that a FERPA/§ 1983 claim would have been dismissed had it not been withdrawn, given that the University was private).

[12] Schuler v. Board of Educ. of the Cent. Islip Union Free Sch. Dist., 96-CV-4702(JG), 2000 U.S. Dist. LEXIS 1006 (E.D.N.Y. Feb. 1, 2000); Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144, 45 F. Supp. 2d 664 (D. Minn. 1999); Flannery v. Board of Trs. of Illinois Cmty. Coll. Dist. No. 519, No. 96 C 50148, 1996 U.S. Dist. LEXIS 17049 (N.D. Ill. Nov. 4, 1996); Maynard v. Greater Hoyt Sch. Dist. No. 61-4, 876 F. Supp. 1104 (D.S.D. 1995); Francois v. University of District of Columbia, 788 F. Supp. 31, 33 (D.D.C. 1992), *aff'd*, No. 92-7080, 1993 U.S. App. LEXIS 5051 (D.C. Cir. Jan. 29, 1993) (unpublished opinion); Krebs v. Rutgers, 797 F. Supp. 1246, 1258 (D.N.J. 1992).

[13] Sirohi v. Trustees of Columbia Univ., 162 F.3d 1148 (2d Cir. 1998) (dismissing FERPA/§ 1983 claim against a private university for lack of state action); Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985) (concluding that there was no private right of action under FERPA for a former student who had been denied access to his educational records by a private university—i.e., no state action).

[14] The Eleventh Amendment to the United States Constitution states that "[t]he [j]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by [c]itizens of another [s]tate, or by [c]itizens or [s]ubjects of any [f]oreign [s]tate." Note that the Amendment does not explicitly exclude a suit brought against a state by one of its own citizens. That issue was not resolved until the Supreme Court ruled in Hans v. Louisiana, 134 U.S. 1 (1890), where it was determined that a state also could not be sued by one of its residents. Eleventh Amendment immunity may not be claimed where the relief sought is nonmonetary (e.g., injunction). However, if money damages are sought, and the money to pay the judgment would come from the state treasury, the institution would be immune from federal court suit.

State Public Records Laws

Public records laws, also known as freedom of information acts or sunshine laws, often require public entities to make their records available for public inspection at reasonable times, during regular business hours. As a rule, public colleges are not required to generate new data or to analyze or aggregate existing data in different ways simply because a request for access has been filed. Violation of public records laws generally results in a civil fine, the payment of attorneys' fees and court costs, and injunctive relief. When college administrators have concerns as to a possible conflict between state public records laws and FERPA, they should notify FPCO.[18] Where it is impossible to comply with both state law and FERPA, FERPA compliance still is required in that a state may not decide to prohibit access to students or to provide access to third parties in ways that would violate FERPA.

What Qualifies as a Student Record?

Records to which FERPA applies include any student-specific educational record that the institution is required to maintain by the federal or state government, or any record that college officials elect to maintain. Accessible records may be in any form—handwritten, print, computer media, video tape, audio tape, film, microfilm, microfiche.[19] Not included within the definition of educational records are (1) those that are prepared at the discretion of educators and administrators and are kept in the sole possession of the originator and revealed to no one other than a temporary substitute teacher;[20] (2) law enforcement records;[21] (3) employment records;[22] (4) records made by a physician, psychiatrist, psychologist, or other professional or paraprofessional that are disclosed only to individuals providing treatment;[23] and (5) alumni records.[24] The Family Educational Rights and Privacy Act does not require colleges to make the aforelisted records available to requesting students, or to acquire written consent prerequisite to release. However, if sole possession notes were to be shared with anyone other than a substitute, they would become educational records for FERPA purposes and access or consent would be required.

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[15] Cullens v. Bemis, No. 92-1582, 1992 U.S. App. LEXIS 30892 (6th Cir. Nov. 18, 1992), 979 F.2d 850 (6th Cir. 1992) (unpublished decision).

[16] *Respondeat Superior* is a legal doctrine whereby the master is responsible for acts of the servant (e.g., a governmental unit is liable for acts of its employees).

[17] *Negligence* is the failure to exercise the degree of care that a reasonably prudent person would exercise under similar conditions; it is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm.

[18] 34 CFR § 99.61. *See also* Princeton City Sch. Dist., Bd. of Educ. v. Ohio State Bd. of Educ., 645 N.E.2d 773 (Ohio Ct. App. 1994) (finding that simultaneous compliance with the state Educational Management Information System (EMIS) and FERPA is possible and that the two statutes do not conflict).

[19] 34 CFR § 99.3.

In two related cases, the issue of whether disciplinary records qualified as student records was explored. In *State v. Miami University*,[25] the Ohio Supreme Court required the release of student disciplinary proceedings. The editor of the university newspaper had sought such records to track crime trends. To accomplish this task, the editor did not need, and was not requesting student names, social security numbers, or student ID numbers. Nonetheless, the University refused plaintiff's request and argued that the Ohio Public Records Law specifically exempted disclosure of information that would be prohibited by federal law, in this case FERPA. The court disagreed with the University that the requested information qualified as an exempt student record and held that college disciplinary records were not educational records in that they did not deal with academic performance, financial aid, or scholastic probation.[26] As a result, the court ruled that access was not prohibited by FERPA and was necessary for public safety.[27]

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[20] 20 USC § 1232g(a)(4)(B)(i); 34 CFR § 99.3.

[21] 20 USC § 1232g(a)(4)(B)(ii); 34 CFR § 99.8; 34 CFR § 99.3. *See also* Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991) (observing that criminal investigation reports maintained by the university police department were not student records for FERPA purposes). *But. see* Belanger v. Nashua, New Hampshire Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994) (holding in a § 1983/FERPA case that juvenile records used to determine a K-12 student's educational and residential placement qualify as educational records and that the student's parents should therefore be given access).

[22] 20 USC § 1232g(a)(4)(B)(iii); 34 CFR § 99.3. *See also* Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576 (5th Cir. 1987) (holding that a teacher's former school records included within her personnel file were not protected by FERPA; plaintiff had never attended school in the district where she was employed while the records were required only within her employment), *cert. denied*, 485 U.S. 1008 (1988).

[23] 20 USC § 1232g(a)(4)(B)(iv); 34 CFR § 99.3; 34 CFR § 99.10(f).

[24] 34 CFR § 99.3.

[25] State v. Miami Univ., 680 N.E.2d 956 (Ohio 1997).

[26] *See also* Red & Black Publ'g Co. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993) (requiring access to disciplinary hearing records as was mandated by state law).

In a subsequent case, *United States v. Miami University*,[28] the United States Government (on behalf of the Department of Education) sued two universities (Miami University and Ohio State University) for releasing personally identifiable information in the form of disciplinary records without the prior consent of the students. The federal district court reasoned that the Miami University case discussed above did not control its decision; the prior state decision represented only persuasive authority. It was axiomatic that the federal district court's interpretation of federal law took precedent over that of any state court. To the district court, student disciplinary records (with only a few statutory exceptions) would in fact qualify as student records and therefore be exempt from third-party access without permission. Such records (1) contained information about one or more students; (2) were maintained by recipient universities; (3) were not expressly excluded by Congress as exempt records, even through later FERPA amendments; and (4) were considered to be educational records by the Department of Education (the agency responsible for enforcing FERPA).[29]

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[27] *See also* Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991) (holding that there is no First Amendment right to access disciplinary and investigatory college records and that FERPA did not require access—at most it permitted access); Student Press Law Ctr. v. Alexander, 778 F. Supp. 1227 (D.C.D.C. 1991) (granting preliminary injunction in a case where the Department of Education was enjoined from withdrawing federal funds from any educational institution for granting public access to personally identifiable information regarding students in law enforcement records such as campus police reports); Kirwan v. The Diamondback, 721 A.2d 196 (Md. 1998) (concluding that records regarding preferential treatment of athletes and coaches in regard to parking tickets did not qualify as student records under FERPA).

[28] United States v. Miami Univ., 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

[29] 34 CFR § 99.8(b)(2)(ii). "Records of a law enforcement unit" does not mean "records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution." Furthermore, "disciplinary action or proceeding" is defined as the "investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution." (*See* 34 CFR § 99.3). *See also* DTH Publ'g Corp. v. University of N. Carolina, 496 S.E.2d 8 (N.C. Ct. App. 1998) (concluding that state law did not require access to university disciplinary hearings where confidential and private records would be reviewed); Florida State Univ. v. Hatton, 672 So. 2d 576 (Fla. Dist. Ct. App. 1996) (concluding under state law that the University should have been permitted to provide summaries of cases brought under the Student Conduct Code in lieu of individual student records, even if student identification information was permitted to be redacted from the material).

Student Access of Personal Records

To gain access to personal records, the student can be required to provide proper identification and to review the docket or file while in the records office. The student does not have the right to remove any material, to substitute materials (e.g., withdraw one letter of recommendation and replace it with another), or to review material for which access has been waived (e.g., letters of recommendation). It is important to note that students cannot be denied admission, benefits, services, or financial aid for failure to waive access to recommendations.[30] Furthermore, although access may be denied for "waived" recommendations, the student does have the right to receive a list of persons who have submitted letters.[31]

In addition to the above, if federal aid is received anywhere within a college, the entire institution must meet access and consent requirements, with some limited exceptions.[32] For example, if a student were admitted to law school, but had been denied admission to medical school within the same university, only those records maintained by the law school would be accessible.[33] College students only have the right to access educational records held by regulated institutions they are attending or have attended on a full- or part-time basis (including correspondence and work-study programs).[34] Access is not required for students who have only audited courses[35] or for those who have applied but were denied admission.[36] Additionally, the institution is not required under FERPA to permit the student to view the financial records submitted by his or her parents.[37]

Whether disclosure of test protocols is required under FERPA continues to be debated. Although there is no published higher education case on point, the Office for Special Education Programs, in response to an inquiry regarding test protocols in a K-12 case involving the Individuals with Disabilities Education Act, indicated that access to protocols is not required.[38] Although not legally binding, this response supports the position taken by many educators and psychologists who have ethical concerns about releasing protocols to unqualified professionals. If a request for review of protocols is submitted by a student, it is recommended that direct access by the student be denied, but that access be permitted to a qualified professional of the student's choosing. Such a professional then could discuss test results with the student and review test items within limits imposed by ethics standards.

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[30] 20 USC § 1232g(a)(1)(D)(ii); 34 CFR § 99.12(c)(1)(i).

[31] 20 USC § 1232g(a)(1)(D); 34 CFR § 99.12(c)(2)(i).

[32] 34 CFR § 99.1(d).

[33] 34 CFR § 99.5(c).

[34] 34 CFR § 99.3. *See also* Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991) (concluding that as a prospective student the plaintiff did not have access to university records; she had sought disclosure of records pertaining to the investigation of a sexual incident in the athletic dormitory between a woman and several basketball players).

[35] Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990).

[36] 34 CFR § 99.5(c).

[37] 20 USC § 1232g(a)(1)(C)(i); 34 CFR § 99.12(b)(1).

Notwithstanding the limitations identified above, the college must make available any accessible student records that have been properly requested within a reasonable time, and in no case more than forty-five days after the request.[39] Officials may not unnecessarily delay access to records or destroy records whenever there is an outstanding request for review.[40] Once access is gained, students have the right to have records explained and interpreted.[41] If a copy of all or part of a record is requested, it should be provided at a reasonable cost. Calculation of the cost, however, cannot include labor charges associated with retrieval or search.[42]

Student-Authorized Release of Records to Third Parties

Generally, student consent (dated and in writing) is required before the college can disclose personal information from education records.[43] The consent form used by the college must identify the records to be released, the person to whom they are to be released, and the purported reason for the release.[44] However, forms need not be completed when the student gains personal access or has requested access for others; when college officials with legitimate educational interests review files; or when a third party accesses only directory information (see discussion below). A record of access must be prepared and included within the student's file.[45] This record also qualifies as a student record and is accessible by the student.

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[38] Letter to MacDonald, 20 IDELR 1159 (OSEP 1993).

[39] 20 USC § 1232g(a)(1)(A); 34 CFR § 99.10(b).

[40] 34 CFR § 99.10(e).

[41] 34 CFR § 99.10(c).

[42] 34 CFR § 99.11.

[43] 34 CFR § 99.30(a). Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (E.D. Ky. 1996) (refusing to dismiss a § 1983/FERPA case filed against a superintendent and board members in their individual capacities for disclosing information without permission to a newspaper reporter in regard to a thirteen-year-old hermaphrodite student).

[44] 20 USC § 1232g(b)(2)(A); 34 CFR § 99.30(b).

Persons to whom access is permitted should be informed that they should not release the records to other parties without prior written consent and that they too must maintain a log if access is permitted.[46] If such a secondary receiver of the records provides unauthorized access, the originating institution must deny records access to the violator for at least five years.[47]

Access When Student Permission Is Not Required

Consent to review student records is not required for college officials, including legal counsel, with a legitimate educational interest in the file (e.g., those needing information regarding prior academic performance or disciplinary actions).[48] Nor is it necessary to acquire consent prior to releasing records to other colleges to which the student has applied (assuming notification of transfer);[49] to juvenile justice authorities (although not typically an issue in higher education);[50] to federal, state, and local education authorities for audit and evaluation purposes;[51] to persons needing access for financial aid purposes;[52] to selected educational organizations conducting studies for predictive test development purposes, the administration of student aid programs, or improving instruction;[53] to organizations for accreditation purposes;[54] to persons needing emergency access to protect the health or safety of the student or other persons;[55] or to victims of crimes (limited to records indicating the results of college disciplinary proceedings involving the alleged perpetrator).[56] Furthermore, it is not a FERPA violation when a college provides records in response to a lawfully issued subpoena or court order, although an effort should be made to notify the student prior to the release.[57] Also, FERPA is not violated if an administrator were to inform parents of their underage (below age twenty-one) child's violation of alcohol and controlled-substance policies, as determined by the appropriate disciplinary committee or staff member.[58] However, for parents to be given general access to college records, they must have claimed the student as a dependent on their last federal income tax statement.[59] If so, then access is permitted; if not, access should be denied.

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[45] 20 USC § 1232g(b)(4)(A); 34 CFR § 99.32(a).

[46] 20 USC § 1232g(b)(4)(B); 34 CFR § 99.33(a)(1).

[47] 20 USC § 1232g(b)(4)(B).

[48] 20 USC § 1232g(b)(1)(A); 20 USC § 1232g(h)(2); 34 CFR § 99.31(a)(1).

[49] 20 USC § 1232g(b)(1)(B).

[50] 20 USC § 1232g(b)(1)(E).

[51] 20 USC § 1232g(b)(3) & (5); 34 CFR § 99.35(a). *But see* Board of Educ. of New York v. Regan, 500 N.Y.S.2d 978 (Sup. Ct. 1986) (refusing list of students to state comptroller for audit purposes as he did not qualify under FERPA as a person to whom access is given without student permission).

[52] 20 USC § 1232g(b)(1)(D).

[53] 20 USC § 1232g(b)(1)(F); 34 CFR § 99.31(a)(6)(i).

[54] 20 USC § 1232g(b)(1)(G).

[55] 20 USC § 1232g(b)(1)(I); 34 CFR § 99.36. It is unlikely, however, that this section of the law establishes a "duty to warn" when student records contain information about potentially self-injurious behavior or threats against others. It simply permits the release of information when these and other emergencies arise. Jain v. Iowa, 617 N.W.2d 293 (Iowa 2000).

Notwithstanding the above, and unless restricted by state law,[60] colleges *may* make directory information available to the public without student consent. Release of such information would not generally be considered harmful or an invasion of privacy. Directory information should be available only for current students—not alumni—and may include, but is not limited to: the student's name, address, picture, phone number, e-mail address, date and place of birth, major, list of activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational institution attended.[61] Fax numbers also would presumably qualify under this category. After general notice is provided to all students stipulating that directory information will be made available, the student then has the option to allow or to deny the distribution. Accordingly, whether an actual physical directory is created (e.g., something similar to a phone directory) or specific individual directory information is made available by college staff on a request basis, the student has the right to direct others to deny the distribution.[62]

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[56] 20 USC § 1232g(b)(6); 34 CFR § 99.31(a)(13).

[57] 34 CFR § 99.31(a)(9). *See, e.g.*, Board of Educ. of the Island Trees Union Free Sch. Dist. v. Butcher, 402 N.Y.S.2d 626 (App. Div. 1978) (concluding that under subpoena a school district must reproduce records of all students within a particular teacher's classes to aid him in preparation for a disciplinary hearing; personally identifying data were to be eliminated, however).

[58] 20 USC § 1232g(i).

[59] 20 USC § 1232g(b)(1)(H).

[60] Krauss v. Nassau Cmty. Coll., 469 N.Y.S.2d 553 (Sup. Ct. 1983) (denying access to directory information under both FERPA and the State Freedom of Information Law); Kestenbaum v. Michigan State Univ., 327 N.W.2d 783 (Mich. 1982) (denying disclosure of directory information under state Freedom of Information Act).

[61] 20 USC § 1232g(a)(5); 34 CFR § 99.3.

[62] 34 CFR § 99.37(a)(2).

A common violation of FERPA is the posting of grades by name or social security number without each student's consent. If grades are to be posted, the professor and students need to have a system (for example, the posting of test scores by random numbers assigned to students) where the identification of the students in combination with their grades cannot be identified by third parties.[63] Another common violation is the use of "pick-up" boxes for tests, papers, portfolios, etc. In such instances, students often are permitted to rifle through boxes of materials in an effort to retrieve their work. In the process, they have the unauthorized opportunity to review the work and grades of others. Accordingly, the professor or a staff member needs to be given the responsibility of returning materials directly to students who are known to them or have proper ID. If a student requested permission to pick up the work of another as a matter of convenience to the other student, prior authorization is required.

Right to Amend Records

Students who believe that information contained in the education record is inaccurate, misleading, or in violation of any of their FERPA rights may request that the records be amended.[64] If the designated college official decides that the records should not be changed, the student must be advised of the right to a hearing[65] to be conducted by a disinterested third party, although the person may work for the college.[66] The hearing must be held within a reasonable period of time with the student given advanced notice of the date, time, and place.[67] At the hearing the student may present evidence and be represented by individuals of his or her choice, including an attorney. The decision of the hearing officer must be in writing and be based only on the evidence presented at the hearing.[68] If the student prevails, the records must be changed. If unsuccessful, the student has the right to prepare a statement to be attached to the controversial document explaining the student's concern regarding the record. Such rebuttal statement must be included in the file for as long as the contested record is maintained and distributed or reviewed with the rest of the docket.[69]

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[63] Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992) (enjoining University under § 1983/FERPA from posting class rosters containing undisguised social security numbers and names of students); Kryston v. Board of Educ., E. Ramapo Cent. Sch. Dist., 430 N.Y.S.2d 688 (App. Div. 1980) (disclosing test scores in a scrambled order and with names deleted would protect the privacy of the students yet provide parents with the records they sought under state laws).

[64] 34 CFR § 99.20(a).

[65] Goodreau v. Rector and Visitors of Univ. of Virginia, 116 F. Supp. 2d 694 (W.D. Va. 2000).

[66] 34 CFR § 99.22(c); 34 CFR § 99.20(c).

[67] 34 CFR § 99.22(a) & (b).

[68] 34 CFR § 99.22(e) & (f).

Notwithstanding the above, the FERPA right to challenge inaccurate records does not entitle the student to challenge grades assigned for courses, unless the grade resulted from mathematical error or was not what the instructor intended. Accordingly, if the grade was properly calculated and is one that the professor knowingly assigned, even if it is something less that the student felt was deserved, the student would fail to support a FERPA claim.[70]

Perhaps the most notorious series of cases in this area are those filed under section 1983/FERPA by Lewin against the Medical College of Hampton Roads. Lewin was a former medical school student. He had requested a leave of absence and permission to postpone registration in pharmacology, a required course. The college approved his request with two conditions: during the interim period he was required to successfully complete a pharmacology course at another university and to pass a test administered at Hampton Roads. He completed the course but failed the examination by only a few points. Following his review of the examination, he proclaimed two questions to be defective and demanded that his score be adjusted accordingly, thereby allowing him to pass. College officials disagreed and refused to change his grade; a grade which he argued represented an error within his files and must therefore be corrected. Over time, Lewin had numerous other difficulties in his courses and was eventually dismissed. Between 1993 and 2000, he filed six separate law suits against the College that identified a variety of claims, including FERPA (i.e., the need to correct the grade error).[71]

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[69] 20 USC § 1232g(a)(2); 34 CFR §§ 99.21(b)(2); 34 CFR § 99.21(c).

[70] Altschuler v. University of Pennsylvania Law Sch., No. 95 Civ. 249, 1998 U.S. Dist. LEXIS 3046 (S.D.N.Y. March 13, 1998) (concluding that the plaintiff may not challenge under FERPA a grade that the grader intended), *aff'd*, No. 99-7423, 1999 U.S. App. LEXIS 34303 (2d Cir. Dec. 27, 1999), *cert. denied*, 530 U.S. 1276 (2000); Lewin v. Medical Coll. of Hampton Rds., 931 F. Supp. 443 (E.D. Va. 1996) (concluding that a FERPA action may be brought under § 1983, but that grades the grader intended, even if lower than the student felt he or she deserved, could not be challenged under the Act), *aff'd*, 120 F.3d 261 (4th Cir. 1997); Adatsi v. Mathur, No. 90-2002, 1991 U.S. App. LEXIS 13087 (7th Cir. June 17, 1991) (concluding that a FERPA action may be brought under § 1983, but that the plaintiff failed to support the claim that FERPA permitted a student to challenge a grade that he felt was insufficient); Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) (concluding that FERPA could be used only to change incorrect grades resulting from ministerial error).

[71] Lewin v. Cooke, 95 F. Supp. 2d 513 (E.D. Va. 2000).

He testified that his claims against the College had become a full-time job, to the degree that he no longer had time to engage in full-time employment. Lewin lost each of his claims, with the court eventually holding that his sixth case was frivolous and part of an ongoing effort to harass the defendant. The court then required the plaintiff to submit materials to establish his financial status and the defendant to itemize its prior attorneys' fees and costs. Moreover, the plaintiff was prohibited from filing any future suit against the defendant unless he could show that it presented a new claim and would not prove either frivolous or harassing.

Guidelines for the Practitioner

Although colleges today are, in large part, in compliance with FERPA requirements, some common violations remain. To assist college administrators in their efforts to comply, the following guidelines are provided.

(1) Identify a records official to be responsible for compliance.

(2) Prepare written policies specifying related rights and practices.

(3) Uniformly enforce all related policies.

(4) Properly train staff regarding access rights and release procedures.

(5) Provide access to requesting students without unnecessary delay.

(6) Be sure that college personnel have access only to those files for which their respective positions entitle access. This concern has been exacerbated in recent years due to the availability of student data in computer systems.

(7) Establish procedures regarding the posting of grades and the pick-up of materials.

(8) Keep careful records of access by third parties.

(9) Where parents request access to their child's records, be sure that they claimed the student on their prior federal income tax form.

(10) Ensure that the person responsible for FERPA hearings is impartial and knowledgeable about university records and federal and state law.

(11) Identify directory information to be made available; provide notice to students that directory information is accessible.

Convenience (e.g., the alphabetic posting of grades; access to records via computer data bases), the desire to please (e.g., providing access to parents who have not properly documented their child's continued dependence), and the need to save time (e.g., not requesting faculty to state a legitimate educational reason for accessing files) often are the bases for FERPA violations. Fortunately, most FERPA-related problems are fairly easily corrected once specific infractions have been identified. Ideally, following the above guidelines and conforming with the principles of law reviewed in this chapter will enable college staff and administrators to better protect the confidentiality of all students, including those with disabilities, and to comply with related laws.

8

Intercollegiate Sport

Approximately 24,500 student-athletes representing 977 member institutions within the National Collegiate Athletic Association (NCAA) participated in twenty-two different intercollegiate sports in 2000-2001, including eighty-four championships.[1] Colleges and universities [hereafter referred to as colleges] working through the NCAA strive to ensure fair athletic competition for college students; their intent is not to serve as a "minor" league for professional sports or to provide athletic opportunities for nonstudents. The emphasis is placed on the "student" portion of "student-athlete." Acquiring a college education is the primary goal. Academic eligibility requirements help ensure that student-athletes are academically prepared, in spite of the rigors of intercollegiate sport competition, to succeed in their educational endeavors.[2] The NCAA warns aspiring student-athletes that becoming a professional athlete, although perhaps desirable, is statistically improbable. Of nearly 1,000,000 annual high school football players and approximately 550,000 basketball players, only about 250 ever play in the NFL and around 50 make it to the NBA.[3] The student's primary focus should be on acquiring an education (e.g., degree, licensure, certification); sport participation then should serve as a possible means to acquire that education (e.g., through scholarship), or be undertaken to enhance the student's overall experience while in college.

Ensuring fair competition has proven difficult over the years as student-athletes have become more litigious. Moreover, the institutions that collectively strive to guarantee fair play often try to acquire an edge, to bend a rule, or to create an exception. As a result, NCAA policies often are under attack, either by member institutions that have either had a request denied or been penalized for violating policy, or by students who have been found ineligible to participate for any of a variety of reasons (e.g., violating amateur status,[4] exceeding the five-year limit to complete four years of postsecondary competition,[5] failing to meet academic requirements[6]). Furthermore, colleges often are sued by students when they fail to qualify or are removed from a team. Among the myriad sport-related lawsuits are those associated with disability discrimination. Suits tend to be based on section 504 of the Vocational Rehabilitation Act or the Americans with Disabilities Act (ADA), in addition to the occasional state claim.

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[1] *NCAA Guide for the College-Bound Student-Athlete, at* http://www.ncaa.org/eligibility/cbsa/ (2001).

[2] Cole v. NCAA, 120 F. Supp. 2d 1060 (N.D. Ga. 2000).

[3] *NCAA Guide for the College-Bound Student Athlete, at* http://www.ncaa.org/eligibility/cbsa/ (2001).

[4] Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987) (affirming a lower court decision that had found no state action on the part of the NCAA in denying a hockey player the opportunity to participate in collegiate hockey, given that he

Section 504 prohibits colleges that are recipients of federal financial assistance from discriminating against students with disabilities in physical education courses,[7] intercollegiate and club sports, intramural athletics, recreation, and similar programs and activities. Recipients must provide reasonable accommodation for qualified students with disabilities unless undue hardship would result. To succeed under section 504 in a sport-related claim, a plaintiff must demonstrate that he or she is (1) an athlete with a disability who has been substantially limited in a major life activity (e.g., learning); (2) otherwise qualified for the athletic activity; and (3) excluded from the activity because of disability.

The NCAA does not receive direct federal financial assistance, although there is an ongoing question about whether it is an indirect recipient given its relationship with the National Youth Sports Program Fund (NYSPF).[8] Nevertheless, many courts, including the Supreme Court (i.e., courts that were not confronted with the yet unresolved issue of the NYSPF) have found the NCAA not to be an

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had played on a professional hockey team; it did not matter that he was not compensated while a member of the team).

[5] NCAA v. Brinkworth, 680 So. 2d 1081 (Fla. Ct. App. 1996) (finding that the NCAA's internal procedures for dealing with eligibility claims were adequate and fair and that there was no basis to intervene in the internal affairs of the NCAA; the plaintiff had challenged the procedures used to deny him continued eligibility when he exceeded the five-year limit).

[6] *See, e.g.*, Matthews v. NCAA, 79 F. Supp. 2d 1199 (E.D. Wash. 1999) (upholding an NCAA decision declaring a current student ineligible to participate in sport when he failed to meet total credit hour requirements).

[7] For a related opinion *see* Rancho Santiago Cmty. Coll., 3 Nat'l Disability L. Rep. 52 (OCR 1992) (concluding that the college failed to provide students with disabilities with the opportunity to acquire the same basic underlying skills in physical education as were provided to students without disabilities and that the college failed to provide team-oriented sports for students with disabilities given its generalizations and assumptions about the limitations of students with disabilities).

[8] Bowers v. NCAA, 118 F. Supp. 494 (D.N.J. 2000) (concluding that the NCAA failed to carry its summary judgment burden in showing that it was not a recipient of federal financial assistance given its control and relationship with the National Youth Sports Program Fund).

indirect recipient. They contend that it is inapposite that NCAA member institutions receive such funds, given that the aid was neither intended for intercollegiate sport participation nor earmarked for the NCAA. Therefore, these courts do not require the NCAA to demonstrate compliance with section 504, or any other recipient statute (e.g., title VI, title IX).[9]

In addition, titles II and III of the Americans with Disabilities Act require public and private colleges respectively to provide students with an equal opportunity to participate. Specifically, title II prohibits discrimination based on disability in limiting participation in or denying benefits of the services, programs, or activities of a public entity, including public colleges.[10] Similarly, title III stipulates that persons with disabilities may not be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation provided by a private college, among other private entities.[11] Regulated colleges may not deny opportunities to participate,[12] provide for unequal opportunity, segregate,[13] or screen out[14] students due to their respective disabilities. Furthermore, colleges must make reasonable modifications[15] in their policies, practices, and procedures for persons with disabilities, unless such modifications would fundamentally alter the nature of the goods, facilities, privileges, advantages, or accommodations.

Although the ADA applies to all colleges that participate in intercollegiate sports, the courts are split as to whether the NCAA also is regulated by this law.[16] The Department of Justice (DOJ) purports that the NCAA is a private provider of a public accommodation, and must therefore comply; the NCAA rejects this position. It is important that the Supreme Court eventually resolve this matter or that the ADA be amended to state clearly the intent of Congress. As with section 504, to prevail under the ADA a student-athlete must show that he or she is disabled and qualified to participate in a selected sport and that the alleged exclusion or adverse treatment was based on disability.

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[9] *See* NCAA v. Smith, 525 U.S. 84 (1999) (vacating a lower court judgment that dues payments form recipient colleges of federal funds was sufficient to subject the NCAA to suit under title IX of the Education Amendments of 1972); Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999) (holding that the NCAA was not a recipient of federal financial assistance and was not, therefore, regulated by title VI of the Civil Rights Act of 1964).

[10] 28 CFR § 35.130(a).

[11] 42 USC § 12182(a); 28 CFR § 36.201(a).

[12] 42 USC § 12182(b)(1)(A)(I); 28 CFR § 36.202(a).

[13] 42 USC § 12182(b)(1)(A)(ii) and (iii); 28 CFR § 36.202 (b) and (c).

[14] 42 USC § 12182(b)(2)(A)(I); 28 CFR § 36.301(a).

[15] 42 USC § 12182(b)(2)(A)(ii); 28 CFR § 36.302(a).

[16] Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998) (finding that the NCAA operates a place of public accommodation for purposes of title III, given the degree of control it exerts over the facilities of its member institutions, the position taken by the DOJ, and relevant case law—i.e., *Ganden*, *Butler*); Ganden v. NCAA, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368) (N.D. Ill. 1996) (declaring that the plaintiff had a reasonable likelihood of demonstrating that the NCAA qualified as a place of public accommodation given that it had a close connection to a number of public accommodations—i.e., the athletic

Athletes With Physical Disabilities

At times, athletes possess physical impairments that could place them or others at risk if they were to engage in sport. When their involvement places others at risk (e.g., a student who is wheelchair-confined wanting to participate in regular basketball), denying participation generally goes unchallenged. However, if the risk is only to the athlete with a disability, numerous students have claimed disability discrimination when play is restricted or denied. Cases have been brought by students who were absent paired organs, limbs, or other body parts (e.g., kidneys,[17]

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facilities of its member institutions); Butler v. NCAA, No. C96-1656D (W.D. Wa. Nov. 8, 1996) (denying dismissal motion and motion to dissolve a restraining order by the NCAA—the student had initially received a temporary restraining order so that he might receive an athletic scholarship from the University of Washington; the court reasoned that the plaintiff could develop the evidence necessary to support his argument that the NCAA operates a place of public accommodation). *See also* Butler v. NCAA, No. 99-36187, 2001 U.S. App. LEXIS 1044 (9th Cir. 2001) (remanding to determine amount of attorneys' fees to be awarded to the plaintiff). *But see* Matthews v. NCAA 79 F. Supp. 2d 1199 (E.D. Wash. 1999) (concluding that the NCAA was not a public accommodation); Johannesen v. NCAA, No. Civ. 96-197 PHX ROS (D. Ariz. April 30, 1996) (concluding that title III of the ADA did not apply to the NCAA—a public entity actually "owned" the "place" where the plaintiff was denied access thereby making title III inapplicable), *cited in* Ganden v. NCAA, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. 1996).

[17] Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (E.D. Penn. 1982) (permitting a student with only one kidney to participate in football, given his overall condition, willingness to wear a flak jacket, parental support, and testimony by a leading authority that the decision made by school officials to deny his participation was emotional rather than medical; the court indicated that although it was reluctant to disturb a well-intended decision of school authorities, the board should not have based its decision on recommendations by doctors who lacked either practical experience or the necessary research background to properly evaluate the risk to the plaintiff); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980) (concluding that although medical evidence was mixed as to whether it was safe for a student with only one kidney to safely participate in wrestling, the student-athlete should be given benefit of all doubts; for the board to act *in loco parentis* when

testicle,[18] leg,[19]), had impaired vision[20] or hearing[21], or were wheelchair-confined.[22]

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the parents were fully informed and had made a decision to permit their child to participate was to stand the "doctrine of in loco parentis on its head"—at p. 952); Pace v. Dryden Cent. Sch. Dist., 574 N.Y.S.2d 142 (Sup. Ct. 1991) (permitting a student with one kidney to participate in football and basketball, given affidavits from two medical doctors indicating that his participation would be reasonably safe and support from the student-athlete's parents). *But see* Seay v. Trustees of the California State Univ., No. CV-89-4791, slip op. (C.D. Cal. Oct. 5, 1989) (denying a preliminary injunction requiring Long Beach State University to permit a student-athlete with one kidney to play football).

[18] Prendergast v. Sewanhaka Cent. High Sch. Dist. No. 2, slip op. (Sup. Ct. May 14, 1975) (permitting a student with only one testicle to participate in contact sports, given that his remaining testicle could be substantially protected by wearing a proper guard), *cited in* Colombo v. Sewanhaka Cent. High Sch. Dist. No. 2, 383 N.Y.S.2d 518, 522 (Sup. Ct. 1976)).

[19] Suemnick v. Michigan High Sch. Athletic Ass'n, No. 4-70592 (E.D. Mich. 1974) (permitting a student with one leg to play high school football), *cited in* Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Penn. 1981).

[20] *See, e.g.*, Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (concluding that a substantial justification was present under the doctrine of *parens patriae* to deny two students with vision only in one eye the opportunity to participate in contact sports; neither student had provided medical or statistical evidence to support his position that participation was reasonably safe); Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Pa. 1981) (holding that a football player with vision only in one eye was otherwise qualified to participate in sport); Evans & Redding v. Looney, No. 77-6052-CV-SJ, slip op. (W.D. Mo. Sept. 2, 1977) (permitting two college athletes with vision only in one eye to participate in football once they had signed a waiver of liability); Borden v. Rohr, No. 75-844, oral decision (S.D. Ohio Dec. 30, 1975) (providing a preliminary injunction to permit an Ohio University student who was sighted only in one eye to play college basketball), *cited* in Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Penn. 1981); Kampmeier v. Harris, 411 N.Y.S.2d 744 (App. Div. 1978) (concluding that it was reasonably safe for a student-athlete to participate in contact sports if she were to wear protective glasses; affidavits from two physicians had disagreed with the assessment of the school doctor); Swiderski v. Board of Educ.—City Sch. Dist. of Albany, 408 N.Y.S.2d 744 (Sup. Ct. 1978) (determining that it was in the best interest of the student-athlete to participate in sport and that it was reasonably safe for her to do so provided she wore protective eye shields); Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (Sup. Ct. 1973) (upholding decision of school officials to deny a student with vision in only one eye the opportunity to participate in football; the decision was based on AMA recommendations and the uncontradicted opinion of the school doctor).

[21] Colombo v. Sewanhaka Cent. High Sch. Dist. No. 2, 383 N.Y.S.2d 518 (Sup. Ct. 1976) (reasoning that although there were conflicting views with respect to whether a student's participation in sport was a danger to himself or to others, a board's decision, made on a rationale basis, should not be set aside; although apparently not sufficiently persuasive, the student with a hearing impairment had provided substantial testimony by experts in deaf education and the chairperson of the Committee on the Medical Aspects of Sports, Medical Society of New York in support of his participation).

[22] Hollenbeck v. Board of Educ. of Rochelle Township, 699 F. Supp. 658 (N.D. Ill. 1988) (finding a violation of § 1983 when a wheelchair-confined youth was not permitted to participate in sport with other athletes; the IEP team lacked the

A few early courts upheld the exclusion of the student either because the student failed to provide competent medical documentation or because deference was given to educational officials when medical experts for the plaintiff and defendant disagreed. However, the vast majority of courts between 1974 and 1995 permitted the student-athlete to participate. In such cases, the athlete typically claimed that he or she (1) was an adult (or if a minor, had the support of parents) and should be responsible for making such decisions, notwithstanding claims of *in loco parentis* (i.e., being in place of the parent) or *parens patriae* (i.e., father to all) by the school or college; (2) had documentation from one or more physicians, including sports physicians, attesting to the fact that it was reasonably safe for the student to participate in a particular sport and identifying necessary safety apparel or devices; and (3) was willing to sign a waiver of liability if injured in the normal occurrence of the game.

This position dominated the courts for over twenty years, but appears to be in transition. In *Pahulu v. University of Kansas*,[23] the plaintiff had received a scholarship to play college football but was injured when he suffered a hit to the head when tackled. The team physician determined that because the athlete had a markedly stenotic cervical canal he would incur an extremely high risk of permanent severe neurological injury if he were to engage in contact such as that found in football. As a result, the physician disqualified the plaintiff from further intercollegiate play. The plaintiff was willing to sign a waiver of liability and, to help support his claim, acquired supportive documentation from three specialists whose consensus position was that he could participate in football with no greater risk than would be incurred by any other player. In spite of this documentation, the team physician and consulting neurosurgeon for the university still were of the opinion that the risk of severe injury was too great. The student then sued to acquire a preliminary injunction[24] but the request was denied by a federal district court. The district court concluded that the plaintiff was not "other-

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prerequisite training, experience, or knowledge to make decisions regarding his athletic participation).

[23] Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995).

[24] To obtain a preliminary injunction, the movant must establish a likelihood of success at trial on the merits and show that irreparable harm will be suffered for which there is no adequate remedy at law. If these two conditions are met, the court then must consider the balance of harm between the parties and the effect of granting or denying the injunction on the public or nonparty interests.

wise qualified" and, although intercollegiate football was found to be a major life activity (i.e., learning) for the plaintiff, he was not substantially limited in his opportunities to learn. In reaching its conclusion, the court was unwilling to substitute its opinion of a "correct" medical diagnosis for that of the university physicians, as their judgment was reasonable, rational, and supported by substantial, competent evidence.

A similar ruling was provided by the Seventh Circuit in *Knapp v. Northwestern University*.[25] In that case, the plaintiff played collegiate basketball and had previously experienced sudden cardiac death. Paramedics were able to use cardiopulmonary resuscitation, defibrillation, and injections of drugs to enable his heart to restart. He later had an internal cardioverter-defibrillator implanted in his abdomen; this device was designed to enable his heart to restart if it were to stop again. The team physician disqualified the plaintiff solely due to his health. Once again there was considerable conflicting expert testimony regarding the risk of future injury. On eventual appeal, the Seventh Circuit held that the plaintiff's learning and education were not substantially impaired by the disqualification and that he was not therefore "disabled" under section 504. Furthermore, the court theorized that even had the plaintiff been "disabled," he still failed to meet legitimate physical qualifications and, as a result, was not otherwise qualified. In reaching its decision, the court proclaimed that its role was not to determine which experts were correct; rather, it needed only to ensure that the team physician's decision was individualized, reasonable, and based on competent medical evidence.

Given the conflict between the courts regarding the right to play sport in spite of possible severe health repercussions, this area of law should continue to be watched. If educational entities are to prevail in future litigation, it is clear that they must make decisions on an individual basis, fairly consider the aggregate of circumstances and facts, and base decisions on competent medical testimony, rather than stereotypes or assumptions. Such a process will inevitably result in some rejections but also some approvals. Those who are approved may at times require accommodations or modifications, assuming no undue hardship or the fundamental alteration of the nature of the activity.[26] This latter issue was addressed by the Supreme Court in 2001.

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[25] Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997).

In *PGA Tour, Inc. v. Martin*, the Supreme Court, in a 7-2 decision, handed down a narrowly tailored decision that has the potential of altering the nature of organized sport in America.[27] In that case, the plaintiff was a professional golfer who was afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that affected his walking. Walking caused him great pain, fatigue, and anxiety and undertaken in excess could result in hemorrhaging, the development of blood clots, or fractures so severe as to require amputation. He requested permission to use a golf cart when competing in PGA tournaments where walking was required and was refused. He then filed suit claiming an ADA violation. Although one might have presumed that the business relationship between Martin and the PGA would have been one of association/employer to private contractor/employee and therefore fall under title I, the Court pronounced that it was one of public accommodation to client/customer and that the PGA had denied Martin equal access to its tours on the basis of his disability in violation of title III.

To the Court, permitting the use of a golf cart would not unduly advantage the plaintiff given his overall condition. The modification was reasonable and necessary, and would not fundamentally alter the nature of the competition. "Shot-making" was found to be the "essence" of golf while walking was ruled neither an essential attribute of tournament golf nor an indispensable feature, notwithstanding testimony by golf legends Arnold Palmer, Jack Nicklaus, and Ken Venturi who explained how conditioning and fatigue can be critical factors in tournament participation, particularly during the last day. The Court noted that the rules of golf neither prohibit nor require the use of carts; requiring participants to walk tends to be a practice required only during particular events or on particular courses.

Although the Court made every effort to narrowly tailor its decision, the prognosis for the future in the dissent by Scalia and Thomas seems possible, if not probable. They forecast an increase in litigation, ultimately making the courts responsible for making eligibility decisions and for selecting modifications that would place each participant with a disability on "par" with others without giving that participant an advantage. The dissent sarcastically projects that this decision could affect sport even at the Little League level where a student with Attention-deficit Disorder might request four strikes rather than three as his disability makes it less likely that he will be able to hit a pitched ball. Scalia further purports that:

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[26] Olinger v. United States Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000) (holding that elimination of the walking rule would fundamentally alter the nature of the game and that the ADA did not require the USGA to bear the administrative burden of trying to evaluate requests to waive the walking rule), *vacating and remanding*, 121 S. Ct. 2212 (2001) (remanding the case for further consideration in light of *Martin*).

[27] PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001).

> Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration—these talents are not evenly distributed. No wildeyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution . . . . [The majority's] Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability (or at least no one's lack of ability so pronounced that it amounts to a disability) will be a handicap. The year was 2001, and 'everybody was finally equal.'[28]

Although this decision has been applauded by many advocates for the disabled, it clearly has the potential to reshape sport. In fact, *Martin* could prove as significant to sport as *Tinker*[29] was to student rights.

Athletes With Mental Disabilities

Although academic requirements for initial and continuing eligibility are facially neutral,[30] students with disabilities, as a group, do not do as well on standardized tests and grade point average (GPA) than do students without disabilities, and often take courses that have not been identified as "core."[31] As a result, students with disabilities at times fail to meet NCAA academic eligibility requirements, and claim discrimination.[32] Such claims have had mixed success, but with recent DOJ intervention future plaintiffs may fair better than those who preceded them.

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[28] PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1905 (2001) (Scalia dissent).

[29] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[30] For something to be facially neutral means that it is not discriminatory on its face. For example, having a policy explicitly prohibiting students who are vision impaired from participating in archery is facially discriminatory, while limiting participation only to the best ten archers, even when such a limitation will "foreseeably" limit participation of vision-impaired students, is facially neutral. Note that both facially neutral and facially discriminatory policies can result in the near or complete exclusion of students with vision impairments.

Following a two and one-half year investigation, the DOJ pressured the NCAA to amend its eligibility policies as they affect students with disabilities. Although the NCAA agreed to comply with title III of the ADA consistent with a consent decree,[33] it continues to express the position that it is not a place of public accommodation and is not therefore responsible for compliance with the Act. Nevertheless, to avoid further litigation and investigation, the NCAA agreed to change how it assesses academic eligibility, to provide staff with training necessary to ensure proper administration of the decree (including training regarding how students with learning disabilities are taught; how specialized curricula can be developed; and how to predict academic success), to amend existing materials and brochures to reflect the agreement, to notify member institutions and high schools of its rule changes, and to designate one or more persons as ADA compliance coordinators.[34] One commentator has argued that application of these and other DOJ mandates may ultimately compromise NCAA's ability to maintain any type of meaningful academic requirements for member institutions and possibly change the nature of collegiate sport.[35] Current criteria for eligibility are reviewed below.

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[31] Bowers v. NCAA, 9 F. Supp. 2d 460 (D.N.J. 1998) (denying summary judgment for the NCAA given that fact questions remained; but claims against the national testing service and the NCAA's clearinghouse were not subject to suit under the ADA); Bowers v. NCAA, 974 F. Supp. 459 (D.N.J. 1997) (denying preliminary injunction and concluding that a freshman with a learning disability was not discriminated against by the NCAA due to the organization's core course requirements for eligibility).

[32] For K-12 related cases *see* Texas Educ. Agency v. Stamos *ex rel.* Class of All Pub. Sch. Children, 817 S.W.2d 378 (Tex. Ct. App. 1991) (upholding a state's "no pass, no play" statute requiring all students to meet academic standards before being cleared to participate in extracurricular activities). *But see* Hoot *ex rel.* Hoot v. Milan Area Sch., 853 F. Supp. 243 (E.D. Mich 1994) (denying summary judgment in a case where a student with Attention-deficit Hyperactivity Disorder failed to earn a sufficient number of credits to remain eligible to participate in football).

[33] A consent decree is an agreement between the parties that has been sanctioned by the court. It does not serve as the opinion of the court and is not precedent setting.

[34] United States v. NCAA, consent decree (D.D.C. May 26, 1998).

Qualifying for Initial and Continuing Eligibility

The NCAA mandates that Division I and II schools require athletes to have graduated from high school; to have successfully completed (D or better) at least thirteen high school "core courses" (i.e., four English; two natural or physical science—including at least one lab class; one algebra; one geometry or one year of a higher level mathematics course for which geometry is a prerequisite; two social science; one additional English, mathematics, natural or physical science; two additional academic courses from any of the aforelisted areas or from foreign language, computer science, philosophy, or nondoctrinal religion); and to have obtained a core course GPA/test score that meets the appropriate index scale.[36] [See Table 8-1 for the Initial Eligibility Index.] If a student has more than thirteen core courses, the GPA is computed by using the highest thirteen grades.[37] Also, if the student takes the ACT or SAT more than once, he or she may combine the best scores on each of the subparts to arrive at a qualifying score.[38]

A core course is a recognized academic course (excluding vocational and personal-service courses) that offers fundamental instructional components in a specific area of study. To qualify as a core course, the course may not be taught below the high school's regular academic instruction level.[39] Also, neither independent study nor correspondence courses may be used to satisfy minimum core-curriculum requirements.[40]

The Academics/Eligibility/Compliance Cabinet has the authority to certify core courses (e.g., special education courses) that appear to be taught at a level below the high school's regular academic level.[41] This procedure requires the principal to submit a written statement indicating that the contested course and the regular course are substantially equal both quantitatively and qualitatively (e.g.,

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[35] Presentations by Stephen Thomas to Education Law Association, Chicago, Illinois, November 2000 & Albuquerque, New Mexico, November 2001.

[36] NCAA Bylaws, 14.3.1.

[37] NCAA Bylaws, 14.3.1.3.5.

[38] NCAA Bylaws, 14.3.1.4.2.

[39] NCAA Bylaws, 14.3.1.3; United States v. NCAA, consent decree (D.D.C. May 26, 1998).

[40] NCAA Bylaws, 14.3.1.3.2.

[41] NCAA Bylaws, 14.3.1.3.4.

Table 8-1
NCAA Initial Eligibility Index

Core GPA	ACT	SAT
2.500 & above	68	820
2.475	69	830
2.450	70	840-850
2.425	70	860
2.400	71	860
2.375	72	870
2.350	73	880
2.325	74	890
2.300	75	900
2.275	76	910
2.250	77	920
2.225	78	930
2.200	79	940
2.175	80	950
2.150	80	960
2.125	81	960
2.100	82	970
2.075	83	980
2.050	84	990
2.025	85	1000
2.000	86	1010

Source: *NCAA Bylaws, 14.3.1.1.1.*

the course might be taught under a different format or at a slower pace, but have the same content and require the same level of course mastery). However, students with disabilities still must complete each of the required core courses and earn the minimum required GPA.[42] Moreover, the Cabinet will consider whether a course was part of the student's individualized education plan (IEP) or was taken to help the student compensate for a particular disability.[43] For students with documented learning disabilities, the NCAA will accept: course work completed between the time of high school graduation and full-time college enrollment; scores derived from taking the ACT or SAT in a nonstandard format (e.g., with a reader, greater length of time);[44] and ACT or SAT scores taken on administration dates other than those designated as national testing dates[45]—although the student still must obtain the minimum required score and the person administering the test may not be a member of the athletics department at the high school or an NCAA member institution.[46]

If all published standards are met, a student will receive "qualifier" status. As such, the student is eligible to practice with the team, compete in intercollegiate events, and receive financial aid or scholarships. When students fail to meet published academic standards, they (or the students' institutions) may request a waiver. It is the responsibility of the NCAA Division I Initial-Eligibility Waiver Committee to determine whether a student is sufficiently academically prepared to succeed in college, notwithstanding traditional indicators to the contrary.

In making a decision as to whether to grant a full or partial waiver (discussed below), the Committee, which includes persons with expertise in the field of learning disabilities, will consider the degree to which the student's disability attributed to the failure to meet one or more eligibility criteria; whether noncore courses were specified in the student's former IEP or were required for graduation under state or local policy; whether K-12 noncore courses helped to prepare the student to complete college courses and degree requirements; GPA in core and noncore courses; whether the GPA improved or worsened as the student progressed through high school; test scores; motivation; attitude toward learning; assessments provided by school principals, guidance counselors, and teachers; written or oral comments by the student; and prior accommodations available and used while in high school. The Committee also will determine the weight, if any, to be given to standardized test scores and, when factoring in test scores, will not place an undue emphasis on a particular subscore when it is within the student's area of disability (e.g., if a student has a reading disability, there should be decreased emphasis on the English subscore). Additionally, the Committee will consider any extenuating circumstances that may have adversely affected the student's ability to meet established standards.[47]

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[42] NCAA Bylaws, 14.3.1.3.4.

[43] United States v. NCAA, consent decree (D.D.C. May 26, 1998).

[44] *But see* Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998) (concluding that the plaintiff failed to substantiate that his Generalized Anxiety Disorder with a Specific Phobia—i.e., testing—qualified him as disabled; the court opined that the student's prior poor test performance was more likely due to a lack of motivation, preparation, and effort, rather than to disability and did not require the NCAA to accept his test scores that were acquired under nonstandard conditions).

[45] NCAA Bylaws, 14.3.1.4.3.

[46] NCAA Membership SVC, Nov. 11, 1997.

Once initial eligibility is acquired, the student-athlete still must make satisfactory progress toward a degree, as that term is defined by the educational entity,[48] and declare a major after four semesters of full-time enrollment[49] if eligibility is to be maintained. To ensure satisfactory progress, 25% of the course work must be completed in the first four semesters; 50% in the first six semesters; and 75% in the first eight semesters,[50] unless a waiver is acquired from the Satisfactory-progress Waiver Committee.[51] The student-athlete generally must pass twenty-four credit hours per academic year with a minimum of eighteen hours earned during the fall and spring (or at least 75% of total).[52] Additionally, no more than 25% of academic credits may be earned during the summer or through correspondence courses.[53] The aforementioned bylaw often is referred to as the 75/25 rule.

The 75/25 rule was recently challenged in *Matthews v. NCAA*[54] where the plaintiff lost football eligibility when he successfully completed only seven and nine credits (64% of total) during the fall and spring terms respectively, but earned nine credits (36% of total) during the summer. Accordingly, although he earned twenty-five credits during the year (above the required twenty-four), 36% was earned during the summer. The NCAA had previously accommodated plaintiff's learning disability (reading and writing) by permitting him to take nine credit hours during the fall in 1997 and waiving the 75/25 rule in 1998, but refused to do so in 1999. The plaintiff's academic performance had not improved with the previous accommodations (in part due to his failure even to attend class).

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[47] United States v. NCAA, consent decree, attachment B (D.D.C. May 26, 1998).

[48] NCAA Bylaws, 14.4.1.

[49] NCAA Bylaws, 14.4.3.1.4.

[50] NCAA Bylaws, 14.4.3.2.2.

[51] NCAA Bylaws: 14.4.3.1.3.2 (hours earned annually); 14.4.3.2.2.4 (waiver of degree requirement); 14.4.3.2.1.3 (hours earned entering fourth year); 14.4.3.3.1.3 (grade point average); 14.4.3.4.5.1 (correspondence and extension course restrictions); 14.4.3.6 (satisfactory-progress rule); 14.4.3.8 (disability).

[52] NCAA Bylaws, 14.4.3.1.

[53] NCAA Bylaws, 14.4.3.1.3.

[54] Matthews v. NCAA, 79 F. Supp. 2d 1199 (E.D. Wash. 1999).

When he was declared ineligible, plaintiff filed suit under a variety of laws, including the Fourteenth Amendment (through section 1983) and the ADA, challenging the 75/25 rule. The purpose of the rule was to help ensure that student-athletes would pursue degrees at a rate generally equivalent to the general student body. Furthermore, numerous member institutions had expressed concern that if student-athletes were permitted to enroll disproportionately during the summer, they would have less integration with other students and receive fewer academic opportunities than are available during the fall and spring terms. Others purported that summer courses often have less substance and/or fewer requirements than those offered during the academic year and if taken in disproportionate numbers could adversely affect the student's quality of education.

The court resolved the constitutional claim by noting that the NCAA is not a state actor and that failure to directly provide the plaintiff with a hearing did not violate the Due Process Clause (see related discussion in Chapter 1).[55] Public member institutions may be sued under the Constitution, but the NCAA, as a private corporation not acting within any type of governmental capacity, may not.

The ADA claim also was found meritless. The court held that the ADA does not apply to the NCAA in that it is not a provider of a public accommodation.[56] It does not regulate the hours of operation of college athletic facilities, specify staffing requirements, maintain employees at member institutions, obtain revenue from operation, or determine who may enter facilities. The colleges themselves are responsible for setting ticket prices, selling tickets and concessions, scheduling games, and controlling media, and not the NCAA.

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[55] *See also* NCAA v. Tarkanian, 488 U.S. 179, 197 (1988).

[56] *See also* Elitt v. USA Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996); Brown v. 1995 Tenet ParaAmerica Bicycle Challenge, 959 F. Supp. 496, 499 (N.D. Ill. 1997); Stoutenborough v. National Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995).

As an alternative to seeking full-qualifier status, student-athletes may request that they be partial qualifiers. To be a partial qualifier, the student-athlete need have only graduated from high school and have obtained a core course GPA/test score that meets the appropriate index scale.[57] [See Table 8-2 for Partial-Qualifier Index.] Accordingly, students seeking partial-qualifier status need not have completed the requisite number of core courses.

Partial-qualifier status allows the student-athlete to practice with a team and receive a scholarship during the first year he or she is in college, but not to participate in competition.[58] The athlete would typically have three years of eligibly remaining, but could receive a fourth year if certain requirements are met. To qualify, student-athletes must have completed at least 75% of their degree program by the beginning of their fifth year of full-time enrollment, or have received a waiver. To initiate the process, the student is responsible for providing copies of the most recent disability diagnosis and college transcripts, as well as any additional documentation that is relevant to the student's educational achievement, to a designated staff member (typically located in the Office for Student Disability Services or similar administrative unit). This person is responsible for assisting students with disabilities, evaluating information provided by the student, and determining whether any accommodation is required (e.g., reduced course load). If the staff member determines that the student is eligible for a fourth year of eligibility, a letter supporting that position is delivered to the athletic department, with a copy sent to the student. The athletic department then is responsible for informing the NCAA of the eligibility decision. On the other hand, if the staff member determines that the student is not eligible for a fourth year of eligibility, the student has the right to appeal the decision to the Division I Satisfactory-progress Waiver Committee.[59]

In a related case dealing with partial-waiver status, a district court in Illinois in *Ganden v. NCAA* denied a preliminary injunction to a learning-disabled student who claimed that NCAA academic requirements discriminated against him due to his learning

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[57] NCAA Bylaws, 14.02.9.2.

[58] NCAA Bylaws, 14.3.2.1.1.1.

[59] United States v. NCAA, consent decree, attachment A (D.D.C. May 26, 1998).

Table 8-2
Partial-Qualifier Index

Core GPA	ACT	SAT
2.750 & above	59	720
2.725	59	730
2.700	60	730
2.675	61	740-750
2.650	62	760
2.625	63	770
2.600	64	780
2.575	65	790
2.550	66	800
2.525	67	810

Source: *NCAA Bylaws, 14.3.2.1.1.*

disability.[60] The NCAA already had provided individual review of his waiver application; counted three of his remedial courses as core courses; accepted his nonstandardized ACT scores; and provided him with partial-qualifier status even though his adjusted GPA did not meet minimum standards. He received partial-qualifier status in part because the NCAA also considered the fact that his grades had improved during his junior and senior years. Given this level of accommodation, the NCAA argued that it had sufficiently accommodated the student's learning disability and that to require it to do away with its academic standards or to further lower applicable standards to enable the plaintiff to qualify would fundamentally alter the nature of its operation. The court held that the NCAA must comply with title III of the ADA, given its close connection to public accommodations, but agreed with the NCAA's position that the ADA did not require it to abandon its eligibility requirements (i.e., core course, GPA, test score). All that is expected is that the NCAA make reasonable modifications where appropriate, as had already been done in this case.

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[60] Ganden v. NCAA, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368 (E.D. Ill. Nov. 19, 1996).

Guidelines for the Practitioner

College staff and administrators today have increased responsibility in regard to the athletic participation of students with disabilities. They must comply with the above requirements of section 504 and the ADA, yet remain in compliance with NCAA mandates, if their respective institutions are to participate in NCAA athletic events. The NCAA is unwilling to totally eliminate its academic eligibility requirements (although they have clearly suffered a major blow given recent DOJ and judicial pronouncements). Because the majority of academically unqualified students will be able to generate the necessary documentation to substantiate some form of learning disability (although they may have to "shop around"), it is foreseeable that the number of administrative claims and law suits will continue to increase in this area unless the Supreme Court intervenes on behalf of the NCAA.

In an effort to provide nondiscriminatory opportunities to participate in sport, comply with NCAA regulations, and avoid litigation, the following guidelines are suggested.

(1) Ensure that the ADA compliance officer, the athletic director, the student-athlete, and the NCAA are communicating effectively with one another.

(2) Ensure that paper work is completed thoroughly and submitted timely.

(3) Educate all relevant staff in regard to NCAA regulations and ADA requirements.

(4) Establish policies that are clear and easily followed. Checklists to ensure that specific procedures have been followed should prove helpful, given the complexity of compliance.

(5) Maintain academic and disciplinary standards while at the same time provide appropriate accommodations and modifications for students with disabilities.

9

Disciplinary and Academic Dismissal and Other Sanctions

If students with disabilities, like other higher education students, were to violate either criminal law or a college's code of conduct or policy, college or university [hereafter referred to as college] officials may give warnings, place on probation, remove from athletic teams or other extracurricular activities, restrict privileges, reduce grades, suspend, expel, or provide other appropriate penalties. In addition, any student (assuming reasonable accommodation if he or she has a disability) who fails to meet academic requirements for continued matriculation can be warned, placed on probation, or dismissed. A discussion of disciplinary and academic hearings and sanctions is provided below. A review of due process is provided first, while guidelines for the practitioner are identified at the end of the chapter.

Due Process

Specific due process procedures for the discipline of higher education students (including those with disabilities) are not identified in federal constitutional or statutory law. However, both public and private colleges are required under contract law to follow their own procedures (often designated in a student rights handbook or a code of conduct), while public colleges also must comply with the more general provisions of the Fourteenth Amendment Due Process Clause. Where a Due Process Clause violation is alleged in a higher education setting, the courts determine whether the plaintiff has a liberty or property interest at stake; if so, whether a state actor infringed on such an interest; and, if so, whether adequate due process procedures were followed. (See Figure 1-1 in Chapter 1.) The level and type of due process will in part be determined by the nature of the alleged violation and the potential sanction, with the more severe penalties receiving heightened protection. Furthermore, the procedures employed in disciplinary hearings will differ markedly from the limited due process used in academic hearings.

Disciplinary Hearings and Sanctions

Unfortunately, crime is not unknown to the ivory tower, particularly conduct associated with alcohol, drugs, and sex. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1998[1] (i.e., the Clery Act, as it is commonly known, is in memory of Jeanne Clery, a student murder victim at Lehigh University in 1986; the 1998 Act is the latest iteration of a law first passed in 1990, The Student Right-to-Know and Campus Security Act[2]) requires postsecondary recipients of federal financial assistance to submit an annual statistical report to the Department of Education summarizing the occurrence of alleged (the data do not reflect prosecutions or convictions) homicide (murder and manslaughter), sex offenses (i.e., forcible sex offenses including rape, sodomy, sexual assault with an object, forcible fondling and nonforcible sex offenses—incest and statutory rape), robbery, aggravated assault, burglary, motor vehicle theft, arson, liquor law violations, drug law violations, illegal weapons possession, and selected hate crimes (i.e., delimited to those associated with race, gender, religion, sexual orientation, ethnicity, or disability) and to provide safety and crime information to members of the campus community.

Unfortunately, knowledge of the occurrence of campus crime and resulting administrative responses have not necessarily resulted in its reduction. Between 1997 and 1999 (the most recent data available at the time of this writing), the occurrence of murder/manslaughter, aggravated assault, and motor vehicle theft declined on college campuses, but forcible sex offenses, nonforcible sex offenses (e.g., consensual sex but with an underage participant), robbery, and burglary each increased. (See Table 9-1.)

Furthermore, the occurrence of cheating and plagiarism among college students continues to increase. McCabe reports that 87% of surveyed students admitted to cheating on written work and 70% cheated on a test at least once. Approximately 49% impermissibly collaborated with others on an assignment, 52% copied the work of another student, and 26% plagiarized. He associated such lofty numbers (all increases over recent years) to the lack of institutional support for professors, the level of intimidation created by students, concern over being sued, the perceived need to make students happy, and the reluctance to offend.[3] Perhaps additional factors could be the hesitancy of professors to engage in conflict—it is easier and creates less anxiety to simply give the grade and not have to con-

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[1] 20 U.S.C. § 1092(f).

[2] 20 U.S.C. § 1001, P.L. 101-542.

[3] *College Student Cheating Widespread*, NATIONAL CENTER FOR POLICY ANALYSIS, IDEA HOUSE, *at* www.ncpa.org/pi/edu/jan98o.html (2001).

Table 9-1
Campus Crime

Crime Category	Public			Private, non-profit			Private, for-profit			Grand Total		
	1997	1998	1999	1997	1998	1999	1997	1998	1999	1997	1998	1999
Murder/non-negligent manslaughter	13	20	7	5	3	4	0	1	0	18	24	11
Forcible sex offenses	1,081	1,138	1,126	584	629	698	3	5	18	1,668	1,772	1,842
Nonforcible sex offenses	336	386	423	123	169	189	13	10	15	472	565	627
Robbery	1,133	1,084	1,005	565	639	733	112	139	259	1,810	1,862	1,997
Aggravated assault	2,648	2,759	2,544	1,055	1,021	1,000	51	76	233	3,754	3,856	3,777
Burglary	16,642	15,748	15,173	9,488	9,167	9,772	627	770	1,090	26,757	25,685	26,035
Motor vehicle theft	4,822	4,375	4,147	1,724	1,465	1,496	196	210	558	6,732	6,050	6,201
Arson	NR	NR	793	NR	NR	350	NR	NR	24	NR	NR	1,167
Negligent manslaughter	NR	NR	5	NR	NR	2	NR	NR	3	NR	NR	10

NR - Not Required

Source: UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF POSTSECONDARY EDUCATION, THE INCIDENCE OF CRIME ON THE CAMPUSES OF U.S. POSTSECONDARY EDUCATION INSTITUTIONS (January 18, 2001), p. 68.

front—and the fact that faculty salary increases often are tied, at least in part, to student evaluations.

When students who engage in crime are prosecuted and convicted they often are removed from campus without the provision of a college hearing. Other times, however, the students are not prosecuted (e.g., perhaps the evidence against them was acquired through an illegal search and seizure and was suppressed or perhaps admissible evidence was insufficient), charges are dropped, or the conduct violated college code but not criminal law. If the student then is to be sanctioned in any way, a college hearing must be provided.

College disciplinary hearings are not "criminal" hearings and the student is not fined or incarcerated as a result of any rulings. A college administrator or a panel consisting of administrators (e.g., associate dean for student affairs), faculty, staff (e.g., college police or security), and/or students, rather than a judge, assess the evidence and then determine whether the student is guilty of the alleged infraction. At a minimum, disciplinary hearings need to be timely and provide the parties with a fair opportunity to be heard.[4] The student should be given adequate notice of the time and place of the hearing, provided with a full explanation of the charges and evidence, and permitted to represent his or her position either orally and/or in writing. Although not required by constitutional law, colleges also may elect to formalize the process by permitting the right to counsel, the opportunity to cross-examine witnesses, the right to a transcript, and the option of an administrative appeal. Such practices are welcomed by students but often lead to expensive adversarial hearings for colleges. As a result, many colleges provide such enhancements only where the potential sanctions are severe or criminal charges have been filed.

Officers presiding over student disciplinary hearings should consider only the evidence that is presented at the hearing that is determined fair and reliable and base the decision on the evidence that is directed to the specific charge. "Conclusory allegations, improbable inferences, and unsupported speculation"[5] are insufficient to substantiate a claim. Moreover, the hearing officer must be a disinterested third party (i.e., not be a party to the dispute or otherwise be affected by its outcome). In appeals proceedings, it is prudent for the hearing officer not to have participated in the original decision.

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[4] Cabrillo Coll., 8 Nat'l Disability L. Rep. 413 (OCR 1996) (finding that there was insufficient evidence to support a claim of disability discrimination; the student's grievance was delayed due to a summer break; however, the college's grievance procedures were deficient in that they required the grievant to confront the person within ten days of becoming aware of a problem and failed to specify how decisions of a grievance committee are communicated to complainants).

It should be noted that numerous rights available in criminal court are not available during college investigations and hearings. For example, most courts agree that students may not claim the Fifth Amendment privilege against self-incrimination or use as a defense the fact that they were not properly "Mirandized"[6] prior to questioning, even if the charges are criminal in nature. Moreover, it is not considered double jeopardy to have a college disciplinary hearing followed or preceded by a criminal prosecution; they impose different punishments and protect different interests. Double jeopardy applies only to successive criminal prosecutions. Furthermore, the standard of review in college hearings is *preponderance of* evidence (i.e., when the evidence, when considered fairly and impartially, will induce a reasonable belief that the fact in issue is true) a much lower standard than *proof beyond a reasonable doubt* used in criminal prosecutions (i.e., not proof beyond any doubt, not a mathematical certainty; "precludes every reasonable hypothesis except that which it tends to support and which is wholly consistent with defendant's guilt and inconsistent with any other rational conclusion"[7]).

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[5] Doe v. Harvard Univ., Nos. 93-2051, 93-2234, 94-1589, 1994 U.S. App. LEXIS 28320, p. 2 (1st Cir. Oct. 12, 1994) (concluding that a suspended student failed to support the claim that her dismissal was based on disability; the plaintiff also claimed that Harvard had violated § 1983 and the IDEA, notwithstanding the fact that Harvard is private and that the IDEA does not apply to higher education). *See also* Doe v. Harvard Univ., No. 95-1152, 1995 U.S. App. LEXIS 12789 (1st Cir. May 25, 1995) (holding that although plaintiff raised different legal theories in the extant case, they were barred by the doctrine of *res judicata* because they involved the same parties and arose from the same set of facts as in the previous case), *cert. denied*, 516 U.S. 1067 (1996).

[6] A *Miranda* warning is a reminder to suspects of crime that they may refuse to give self-incriminating answers to questions and may have a lawyer's help in answering questions. A "typical" warning states that "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire. If you cannot afford an attorney, one will be appointed for you. Do you understand these rights?"

[7] BLACK'S LAW DICTIONARY 1381 (4th ed. 1976).

Assuming allegations of wrongdoing are sufficiently documented and that appropriate due process is provided, it is unlikely that a resulting disciplinary decision will be overturned by either the courts or the Department of Justice (DOJ). Also, unlike children with disabilities under the Individuals with Disabilities Education Act (IDEA) (qualifying students in preschools, elementary schools, and secondary schools), higher education students are unlikely to be shielded from discipline simply because they are able to show that their behavior is disability related.[8] As a rule, college students who cannot conduct themselves within the parameters of criminal law and college policy will not be otherwise qualified for retention.[9]

Selected disciplinary problems faced by higher education administrators are reviewed below. Included are hearings resulting from the falsification of college records, cheating and plagiarism, classroom disruption, campus disruption, assault and battery, and drugs and alcohol.

Falsification of College Records

Falsifying college records can result in disciplinary sanctions, including the removal of the violating student. Violations in this area include the failure to honestly, accurately, and thoroughly complete applications and other forms as well as the alteration of existing records. In regard to students with disabilities, the courts have yet to identify any physical or mental impairment that will justify such an ethical breach. Accordingly, all violating students may be subjected to the same expectations and punishments.

Falsification of applications and related forms

At times, students have failed to submit required information, inflated or deflated figures, or fabricated responses. In most instances of omission, a simple error has been made that is easily corrected by requesting and receiving additional information. On occasion, however, the omission/misrepresentation was intentional. When violations occur, college officials may not only consider the information that was omitted or misrepresented on the original form (if ever submitted), but also may consider the fact that the student falsified the document. Suspension and expulsion are commonly used when intentional violations are supported; removal can be brief—one semester or quarter—or be permanent, depending on the gravity of the offense.

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[8] For example, it is unlikely that a K-12 child that qualifies as severely emotionally disturbed under the IDEA will be able to be expelled for having struck a student or teacher, given the ease of showing that the behavior is a manifestation of the disability. Such students may be suspended for ten days or less or be placed in an alternative educational setting for up to forty-five days, however.

[9] Del Mar Coll., 1 Nat'l Disability L. Rep. 174 (OCR 1990) (upholding suspension of a student with epilepsy who disrupted class, verbally abused others, including the program chairperson, slammed items in class, and cursed).

It is not uncommon for students to fail to list all previous colleges they have attended. This omission often is precipitated by the desire to keep prior disciplinary and/or academic records confidential. If officials at the college to which the student has applied knew of the applicant's prior violations of code or deficient grade point average (GPA), such information could affect either the admission of the student or eligibility for certification, licensure, or degree. As a result, students at times list only selected prior institutions or none at all. For similar reasons students have been reluctant to inform college officials that they have a criminal record,[10] which may adversely affect matriculation in those programs for which the commission of a crime would render the student unqualified (e.g., most states will not permit a person to become a teacher if ever convicted of a felony); that they had not registered for the military draft, making them ineligible for many forms of financial aid;[11] or that they have a potentially disqualifying psychiatric condition (a condition so severe that reasonable accommodations would not enable the student to be otherwise qualified), affecting their admission, continuation, or re-admission.

In a related case, *Doe v. New York University*,[12] when medical school officials learned that an admitted student failed to disclose that she had a Borderline Personality Disorder, which for her manifested itself in a long history of self abuse and physically violent behavior toward others, they conditioned her retention upon her commitment to continue psychiatric therapy. The plaintiff also was required to agree that if she were to have another psychiatric episode, she would voluntarily withdraw from the program. During her second year, following an argument with the associate dean, such an episode occurred when the plaintiff bled herself with a catheter in one of the college's restrooms—an act which she later explained was the only way she could "cope with her stress."[13] Subsequently, she was granted a leave of absence, but with the understanding that she could request reinstatement after one year if cleared by university doctors.

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[10] University of Idaho, 13 Nat'l Disability L. Rep. 127 (OCR 1998) (upholding removal of a law student with a learning disability, multiple physical injuries, depression, and anxiety for failure to fully disclose his criminal record on his application).

[11] The Department of Defense Authorization Act of 1983, P.L. 97-252, stipulates in part that persons who are required to register for the draft and fail to do so will be ineligible for assistance or benefit provided under title IV of the Higher Education Act of 1965.

[12] Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981). *See also* Anderson v. University of Wisconsin, 841 F.2d 737 (7th Cir. 1988) (finding that an African American student who was alcoholic was not discriminated against when the University dismissed him from law school for the third time; he was dismissed on the basis of "honest judgments" about how he performed in law school and about how he could be expected to perform in the future).

During the five-year hiatus following her withdrawal, Doe received treatment for her mental disorder and successfully completed a master's degree in Health and Policy Management at the Harvard School of Public Health. She also made regular requests for readmission to medical school, but was denied each time following a review of reports from her psychiatrists, as well as those from university specialists. Given the nature and extent of her mental impairment as well as her history, the University required Doe to support the position that she no longer posed a significant risk, either as a student or, upon completion of the degree, as a licensed practitioner. After the filing of several complaints and law suits, Doe eventually received a preliminary injunction ordering her readmission as the district court, somehow discounting testimony from *all* involved psychiatrists, reasoned that it was "more likely than not" that she would be able to complete her schooling without recurrence of her prior behavior and be able to "serve creditably as a physician."[14] He based this position solely on her documented record since exiting the program.

The Second Circuit reversed, however, noting that the plaintiff failed to show that she was qualified in spite of her disability. In denying the mandatory preliminary injunction, the court observed that considerable judicial deference must be given to educators in their enforcement of reasonable nondiscriminatory standards. In the present case, the court found it reasonable for the University to consider the risk Doe posed in determining whether she was comparatively better qualified than other applicants for admission to the highly selective program.

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[13] Doe v. New York Univ., 666 F.2d 761, 767 (2d Cir. 1981).

[14] *Id.* at 772.

Falsification of existing documents

A less common violation than that previously mentioned is the altering or falsification of documents already held by the institution. Such an act could fraudulently misrepresent one's accomplishments (e.g., course credits earned, GPA, awards, degrees, certification, licensure) and result in expulsion or revocation of credentials. In a related case, *Kent State University v. Waliga,*[15] university officials received information that there would be discrepancies in the academic records of at least two former students, Waliga and Taylor. Comparisons then were made between the instructors' grade reports and the official academic records. Twenty-eight differences were identified in Waliga's record and thirty-four in Taylor's record. Both students received grades and course credit for courses they had dropped or had never registered, including courses that had not been offered. They also received passing grades in courses they failed and higher grades for courses in which they passed but performed poorly. A hearing then was held; the former students were notified that they could be present, review the evidence, and question witnesses. Waliga and Taylor were not permitted to have legal counsel, however, and elected not to attend the hearing. The College Advisory Committee heard the evidence from the University's perspective and recommended that the plaintiffs' degrees be revoked.

The students then filed suit claiming that the University lacked the authority to rescind degrees (it only had the power to confer degrees); they prevailed at the trial court and intermediate court levels. On further appeal to the Ohio Supreme Court, the lower courts were reversed. The state high court reasoned that the University, acting through its board of trustees, did have the inherent authority (i.e., authority that exists "not because of any written words but because it would not be sensible, as measured by the norms of postsecondary education, for an institution to be without authority over the particular matter at issue[16]) to revoke an improperly awarded degree due to fraud, deceit, error, or other good cause, assuming adequate due process.

Cheating and Plagiarism

Cheating is the intentional misrepresentation of the source or nature of academic work so as to receive undeserved credit, or to cooperate with another in such misrepresentation.[17] Examples include, but are not limited to the following: review of examinations (in whole or in part) prior to their distribution; using notes, textbooks, or the like during an examination when not permitted to do so; obtaining information about an examination other than that released by the professor (e.g., from a student who took the exam early; from a staff member who was responsible for typing or copying the test); receiving or providing information during an examination; handing in data or other material prepared by another person, but representing it as one's own; falsifying experimental data or information; having another person take one's place for any academic performance (e.g., a test for licensure or certification); using work previously submitted for another course to meet the requirements of the present course without informing the instructor; or giving false information in order to postpone or avoid an examination.[18] In comparison, *plagiarism* is to take or present as one's own a substantial portion of the ideas or words of another. Examples include, but are not limited to the following: copying the words, illustrations, figures, photographs, drawings, models, or other visual and nonverbal materials of another without proper credit or the presentation of work prepared by someone else without citing the original source.[19]

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[15] Waliga v. Kent State Univ., No. 1444, 1984 (Ohio App. LEXIS 11690 (Ohio Ct. App. Nov. 30, 1984), *rev'd*, 488 N.E.2d 850 (Ohio 1986).

[16] William A. Kaplin & Barbara A. Lee, A Legal Guide for Student Affairs Professionals (3d ed. 1997).

Depending upon the gravity of the offense, cheating and plagiarism often result in the refusal to accept the work for credit, assignment of an F grade for the contested work, grade reduction, or an F grade for the course. In extreme cases where the student has completed or is nearing the completion of a program of study, but is found to have cheated or plagiarized to the extent that such activity compromised the integrity and validity of the credential, the college then may elect not to recommend for certification, licensure, or degree (or to recommend to decertify or revoke if a recommendation has already been submitted).

Policies regarding cheating and plagiarism apply equally to all students, including those with disabilities. A district court in Virginia, in *Childress v. Clement*,[20] granted summary judgment in a case involving a graduate student with dysgraphia and other broad, written language disabilities, which allegedly impaired his ability to write legibly and to transcribe written passages accurately. He had submitted the same paper in two courses without professor knowledge or permission, failed to properly cite material in two papers, and represented the contents of all works as his own. At an appropriate hearing, the student was found guilty of three violations of the honor code; that decision was upheld by the University Appeal Board and the student was expelled. On further appeal, the court noted that given the plaintiff's propensity to cheat, no accommodation short of waiving the honor code would suffice. The court concluded that the University was fully entitled to expel the plaintiff and that neither state nor federal disability law was violated in the process.

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[17] *Kent State University Digest of Rules*, (C)1, *at* http://monster.educ.kent.edu/docwhiz/digscap.html (2001).

[18] *Id.*

[19] *Kent State University Digest of Rules*, (C)2, *at* http://monster.educ.kent.edu/docwhiz/digscap.html (2001).

[20] Childress v. Clement, 5 F. Supp. 2d 384 (E.D. Va. 1998).

Classroom Disruption

Although classroom disruptions are not all that common in higher education settings, they do occur. The acts may be as simple as talking, passing notes, making or receiving phone calls, making noise, or playing games; or be as serious as assault, battery, carrying weapons, attempted murder, murder, and so on.[21] As a general rule, the professor is not expected to be heroic or even to take physical action against disrupters or intruders and should not encourage students to do so. Where the disturbance is minor, a verbal charge to "cease and desist" is all that is typically necessary to restore order. If that is unsuccessful, the disruptive student should be ordered from the classroom and informed that continued activity could result in student conduct sanctions and/or criminal arrest. In more serious instances, security may need to be called. Depending upon the nature of the violation, it is possible that the student could be removed from the course or even the college.[22] No student should be permitted to remain in the classroom who represents a threat to others or who materially and substantially disrupts the learning environment.

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[21] *See, e.g.*, Rosenthal v. Webster Univ., No. 98-2958, 2000 U.S. App. LEXIS 23733 (8th Cir. 2000) (concluding that plaintiff's suspension was not due to being bipolar, but rather was due to carrying a gun and threatening to use it). For a related employment case, *see* Palmer v. Circuit Court of Cook County, Illinois, 117 F.3d 351 (7th Cir. 1997) (concluding that there was no evidence that an employee was fired because of mental illness; rather she was fired for threatening to kill another employee—the fact that her behavior was precipitated by mental illness did not present an ADA issue, she simply was engaged in unacceptable behavior), *cert. denied*, 522 U.S. 1096 (1998).

[22] *See, e.g.*, Del Mar Coll., 1 Nat'l Disability L. Rep. 174 (OCR 1990) (upholding the suspension of a student who had been verbally abusive in the classroom on several occasions, verbally abused the program chairperson who refused to provide her with a letter of recommendation, disrupted class, and slammed books and cursed when she received an examination).

Notwithstanding the above, there will be times when disciplining a student for nonviolent (but possibly disruptive) behavior that is clearly disability related will not only be viewed as unfair by the student but also, under very narrow circumstances, may qualify as disability discrimination (e.g., when a student with Tourette's spins or twirls, displays tics, or uses offensive expressions when stressed). In these exceptional circumstances, it will be prudent for experts within Student Disability Services (SDS) to review the student's record to determine whether the inappropriate behavior is a manifestation of his or her disability and, if so, whether any reasonable accommodation exists (e.g., a change in medication[23]; a live interactive video system located somewhere other than the classroom). It is not the responsibility of the college to further evaluate the student, to alter the student's medication, or to prescribe new medical or psychological services. Nor is the college required to establish a one person section for the course or to continue to tolerate disruption in the current course (assuming, of course, that the level of disruption is beyond that typically experienced within higher education classrooms). All that is required in this instance is the good faith effort to properly accommodate *and* not to discriminate based on disability. If an appropriate learning environment cannot be maintained with the use of reasonable accommodations, the disruptive student will not be considered otherwise qualified and may be removed.

Campus Disruption

As a rule, it is prudent to require all demonstrations, marches, and off-campus speakers to be sponsored by a student organization or the college itself, to coordinate activities with campus security, and to restrict related activities to specific areas of the campus during prearranged times. Prior written registration for all activities is encourage to permit necessary coordination and planning. In public institutions operating either a traditional or a limited public forum,[24] student-selected speakers may be denied access to campus and student-initiated activities may be prohibited only if they would foreseeably represent a clear and present danger to those in the campus community or would materially and substantially disrupt the learning environment. Prior restraint and censorship are not to be taken lightly, however, as the burden is placed upon college officials to justify the restriction. Predicting future disruption is more difficult that reporting past occurrences, but that does not mean that it cannot be done. Administrators must assess the nature of the activity, the environment of the campus, and the recent history of events surrounding the speaker or activity and then make an informed decision as to the risks involved. A state compelling interest will have to be supported to deny constitutionally protected expression.

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[23] Doe v. Vanderbilt Univ., No. 96-5561, 1997 U.S. App. LEXIS 34104 (6th Cir. Nov. 26, 1997) (noting that treatment with lithium effectively controlled plaintiff's bipolar disorder, but that the last remaining position in the medical school was given to a better-qualified transfer student).

[24] Forum analysis is applied in related speech cases. Three types of fora have been identified: traditional forum (i.e., places that by long tradition or by

When students with disabilities are involved in campus disruptions, the same standards and procedures apply. Such students have no greater rights than others in regard to constitutionally protected expression, but also have no fewer. Students with disabilities who create disturbances within office areas, do not comply with their agreement as to time, place, and manner of demonstration, threaten staff with physical violence, encourage unlawful activity, or create an environment where danger is eminent, even if their behavior is in whole or in part disability-related, may receive the same sanctions as any other similarly offending student.[25]

Notwithstanding the above, policies in public colleges regarding student protest, demonstrations, sit-ins, and the like must comply with the First Amendment protections of speech, assembly, and

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government fiat have been devoted to assembly and debate); limited public forum (i.e., property that the state has opened for use for expressive activity); and nonpublic or closed forum (i.e., one that is not by tradition or designation a forum for public communication). Strict scrutiny is applied in cases involving traditional and limited public fora, while regulation of speech in a closed forum is constitutional if it is reasonable and not an effort to suppress expression merely because the views are opposed by public officials.

[25] South Suburban Coll., 13 Nat'l Disability L. Rep. 94 (OCR 1998) (finding no support that the College had discriminated against a student due to a perceived mental disability; she had been suspended for engaging in behavior that violated the Student Code of Conduct, had been involved in numerous altercations with staff, used inappropriate language, and was arrested for a disturbance she created in the office doorway of the Vice President of Student Services); Arizona State Univ., 10 Nat'l Disability L. Rep. 272 (OCR 1997) (finding no discrimination when a student with a hearing impairment was arrested for disorderly conduct; she had been angry and confrontational when trying to report to police that her dog had been hit by a person on a bicycle).

association. Students have the constitutional right to express themselves within fairly wide parameters as few forms of speech are proscribable (e.g., fighting words, child pornography, falsely shouting fire in a crowded auditorium, some forms of libel, sexual harassment), although nearly all may have time, place, and manner restrictions placed upon them (e.g., students may not elect to discuss the outcome of a sports event during class when the professor is lecturing or directing a course-related discussion, although they may engage in such discussion before or after class). Public institutions that have attempted to regulate speech, including civility, though broadly worded codes (e.g., hate-speech codes) have had their codes declared unconstitutional when challenged in court[26] or have elected not to enforce their codes when violated given their foreseeably unconstitutional application.[27]

Policies attempting to regulate student expression should be *content neutral* (i.e., not restrict a speaker due to the content of speech) and may not be *overbroad* (i.e., sweep within its ambit a substantial amount of protected speech along with that which it may legitimately regulate[28]), *underinclusive* (i.e., require absolutism whereby within a particular proscribable category of expression, government must either proscribe all speech or no speech at all[29]), or *unconstitutionally vague* (i.e., so vague that persons of common intelligence must necessarily guess at their meaning[30]).

Given the extensive protection for First Amendment freedoms, it is not surprising that there will be times when offensive and demeaning speech must be permitted, if not tolerated. For example, if demeaning speech were directed toward a student with a disability (e.g., for one student to mimic the stuttering of another with the intent to cause embarrassment), and the speech was not disruptive to classroom activity or the campus environment, it may prove difficult to discipline the offender. Words that tend only to demean, embarrass, or humiliate are unlikely to qualify as fighting words (i.e., words that by their very utterance inflict injury or tend to incite an immediate breach of the peace[31]) and therefore be proscribable. However, if the speech were to escalate and qualify as fighting words or to become threatening to the student with a disability, the former behavior (i.e., fighting words) may be sanctioned while the latter (i.e., threatening words) may result in assault charges being filed (see discussion below). Ideally, freshman orientation and other campus programming and counseling will help educate college students and others in regard to individual differences. Although there is no simple solution to problems associated with the "costs" of free speech (i.e., there will always be those who will use their constitutional right to free speech to hurt others), "education" is perhaps the best tool to attack immature behavior, bigotry, and sophistry and to improve civility without violating the First Amendment.

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[26] UWM Post v. Board of Regents of the Univ. of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

[27] Two students at Kent State University in 1992 had engaged in the use of fighting words. One used a racial epithet; the other used terms related to obesity. Both were offensive and confrontational. Only the student using a racial epithet was suspended, however. When the suspended student threatened to sue the University claiming the hate-speech code to be underinclusive, officials reinstated him. Interestingly, the University continues to have a hate-speech code, although it is unconstitutional in at least seven places.

[28] For example, to provide sanctions for the use of words that humble or humiliate in addition to those that qualify as fighting words. *See* Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

[29] For example, to penalize race-based fighting words but not others. *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992) (holding that an ordinance prohibiting the display of a symbol which one knew or had reason to know aroused anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender was facially unconstitutional in that it prohibited otherwise-permitted speech solely on the basis of the subjects the speech addressed).

[30] Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973).

Assault and Battery

Assault is threatening to strike or harm someone. To prove that an assault has occurred, the plaintiff is responsible for showing that the act was intentional (i.e., there is no such thing as a negligent assault) and that it qualified as threatening. The plaintiff must be aware of the threat (e.g., pointing a loaded gun; pointing an unloaded gun but the pointee is unaware that the gun is unloaded; shaking a fist in another's face; chasing another in a hostile manner; informing another that you intend to do him or her bodily harm[32]); there is no assault if the plaintiff is unaware that he or she has been threatened (e.g., a person threatened to harm but spoke nonconfrontationally in an unfamiliar language; the threat could not be heard due to noise). Moreover, there is no assault if the potential victim is too far away to make contact, if the person providing the threat is not perceived as having the ability to immediately carry it out, or if the person claiming an assault is extremely timid and has exaggerated fears of contact, when a reasonable person would not have perceived a threat.[33]

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[31] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that fighting words are proscribable).

[32] For a related OCR decision, *see* Northeastern Univ., 2 Nat'l Disability L. Rep. 127 (OCR 1991) (upholding action to barr a student with depression from a literature class where she had threatened her lecturer and another student in her written journal).

In a related Office for Civil Rights (OCR) complaint, *California State University, San Bernardino*,[34] an instructor was assaulted by a student with traumatic brain injury, resulting in memory difficulties, confusion, difficulty concentrating, and low tolerance for frustration. During his time at the University, he had received extensive accommodation, including open-book, multiple-choice examinations, time-and-a-half on examinations, tests broken into units to allow for a series of brief tests, tutoring, and a notetaker. He also was offered the opportunity to retake an examination if he did not do well. The basis of his complaint was that he was not accommodated further by allowing him to continue in a course which he did not have the prerequisites and which he found "overwhelming" (his word).

The first confrontation between the student and the professor occurred after the second class meeting. The plaintiff was lying on the floor outside the professor's office door, moaning, and holding his head. The professor conversed with him briefly to learn that he was having difficulty in her course and was simultaneously taking a course that was prerequisite to hers. She suggested that he drop her course and focus on the other one at which time he told her that there was no way he would drop and that she would be "in trouble" if she tried to get him to do anything he did not want to do.

Approximately two weeks later, a second confrontation occurred when the professor insisted that the student drop her course after she confirmed that he, in fact, was not qualified. He became angry, spoke abusively, called her profane names, and waved his fist. He then stated emphatically that he would "take care" of her. When he raised his hand as though to strike her, a security officer intervened. Twice later that evening, the student entered the student union (near the professor's office) and loudly informed those present that he intended to kill the professor (i.e., throw her out of the fourth story window). The custodian viewed him as a clear threat and called security. When the campus police attempted to take him into custody, he fled the building, was chased, and was subsequently apprehended and arrested. He was eventually suspended for one year. Following the filing of his complaint, the OCR ruled that his conduct was not due to the University's failure to provide further academic adjustments and that his suspension did not violate disability law.

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[33] W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON TORTS 44 (5th ed. 1984).

[34] California State Univ., San Bernardino, 5 Nat'l Disability L. Rep. 38 (OCR 1993).

In contrast to assault, *battery* is the intentional, unwanted, and offensive or harmful touching of another person with the intent to cause said person to suffer the contact. Actual harm is not necessary to bring suit. However, all touching does not constitute battery (e.g., unwittingly touching in a crowded elevator). Self-defense and the defense of others (where necessary and within appropriate limits) may serve as defenses to battery claims.[35]

As in other instances discussed above, if a student with a disability were to assault or batter another, he or she may be subjected to the same sanctions as any other student. However, cognizance of the student's disability and potential to be accommodated (e.g., medication, counseling, therapy) may be helpful in ascertaining whether the student represents a continuing risk and, therefore, whether the student should be allowed to re-enter the institution, even if such knowledge is unlikely to have any bearing on the disposition of the initial assault or battery violation. In a related OCR complaint, *Western Michigan University*,[36] a student with paranoid schizophrenia, who refused to stay on her prescribed treatment regimen or be hospitalized for more extensive care, was suspended from the University for disruptive behavior that was viewed as "disturbing and threatening." Among her numerous violations were the blocking of a doorway so that another student could not exit; attempting to strike her psychiatrist; and following a blind student from the main lobby to a second-floor restroom where she grabbed her and played with her hair. The OCR ruled that although claimant's behavior may well have been disability-related, section 504 did not prohibit the University from establishing and uniformly enforcing reasonable rules of behavior so as to maintain a safe and orderly educational environment.

Drugs and Alcohol

Alcohol consumption has been a problem for higher education administrators for as long as there have been colleges; drug problems are of more recent origin (1960s to date). The sale of illegal drugs and alcohol on campus, their use, and the behaviors that result from such use (e.g., battery, nonconsensual sex), each in its own way, creates obstacles to providing a safe place for students and faculty. In addition, students today are increasingly engaged in the mixing of prescription drugs with alcohol and/or illegal drugs, at times with fatal consequences. Ritalin (a stimulant often used to treat Attention-deficit Hyperactivity Disorder) and Valium (often prescribed for anxiety) in particular have become common ingredients within mixtures.[37]

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[35] W. Page Keeton, et. al., Prosser and Keeton on Torts 124-131 (5th ed. 1984).

[36] Western Michigan Univ., 3 Nat'l Disability L. Rep. 267 (OCR 1992).

When illegal drugs are discovered and/or confiscated, all contraband and evidence must be turned over to appropriate criminal authorities. Drugs should not be "flushed" and crime scene protocols need to be followed precisely so that college officials or campus security do not taint evidence that may be admissible in a criminal prosecution. In this regard, it is prudent to have prepared and promulgated related policy and to have used said policy as a basis for discussion during an in-service for administrators and staff.

Alcohol presents a somewhat different problem. Where it is prohibited, its possession or consumption may be subject to penalty. However, alcohol often is sold on campus to age-appropriate students and others and at times is even permitted to be stored or consumed in residence hall rooms. Colleges then tend to attempt to regulate or penalize inappropriate behaviors resulting from the consumption, rather than the consumption itself.

The same is true with the use of prescription drugs. Even if their consumption violates no criminal law, misuse and abuse can be injurious to health and responsible for inappropriate conduct. Moreover, if the student in legal possession of prescription drugs were to sell those drugs, federal and state drug laws would be violated. Involved parties then would be subject to arrest and prosecution. Perhaps of nearly equal consequence to some underage students who have violated college policy on alcohol and drugs, is that information regarding the charges and hearing can be communicated to their parents without violating federal privacy law—see Chapter 7.

In addition to the behavioral and social conduct expectations a college may have of its students, there also will be academic expectations (e.g., GPA; minimum number of courses taken per semester; number of years to complete degree requirements). Related issues, cases, and complaints are reviewed in the following section.

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[37] Julie L. Nicklin, *The Latest Trend: Mixing Prescription Drugs With Other Substances*, THE CHRONICLE OF HIGHER EDUCATION (June 9, 2000), *at* http://chronicle.com/free/v46/i40/40a05801.htm.

Academic Hearings and Sanctions

Many students with disabilities will meet program, degree, certificate, and licensure requirements and will exit college with the desired credentials and training. Some, however, will fail to follow required procedures or practices,[38] earn the necessary credits, or achieve a sufficiently high GPA[39] to be retained in their respective programs, and will either drop out or be academically dismissed.[40]

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[38] University of Washington, 10 Nat'l Disability L. Rep. 161 (OCR 1996) (accepting University's claim that it dismissed a medical student for academic and behavioral reasons unrelated to her learning disability and Attention-deficit Disorder; the plaintiff had exhibited inappropriate behavior in the care of a patient by photocopying the patient's medical records, removing the records from the facility, visiting the patient's apartment, and transporting the patient to the University Medical Center); University of Kansas, 1 Nat'l Disability L. Rep. 287 (OCR 1990) (finding no discrimination where a medical student with pneumonia and a Bipolar Disorder was dismissed from the medical school; the student withdrew from a clerkship without following procedure, failed to report reasons for absences or obtain written verification of illness, and continued to receive financial aid during absence).

[39] Amir v. Saint Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (upholding summary judgment for the University regarding a student's dismissal from medical school as there was sufficient proof that his dismissal was based on poor grades and conduct rather than his Obsessive-compulsive Disorder; but finding a genuine issue of material fact remaining as to whether the University and one of its administrators retaliated against the plaintiff for having filed suit); Texas Wesleyan Univ., 13 Nat'l Disability L. Rep. 208 (OCR 1998) (finding that a law student with an Anxiety Disorder had in fact been provided with extended time to take examinations, a quiet room, and permission to type examinations; she had been dismissed due to poor grades and expressed dissatisfaction with her adjustments only after being dismissed). *But see* Smith v. University of New York, 95-CV-0477E(H), 1997 U.S. Dist. LEXIS 20782 (W.D.N.Y. Dec. 30, 1997) (denying summary judgment in a case where a student with clinical depression received a failing grade and was removed from a master's program).

[40] Lewin v. Medical Coll. of Hampton Rds., 910 F. Supp. 1161 (E.D. Va. 1996) (determining in part that the College dismissed a medical student due to academic reasons rather than the perception that he had a disability—flat affect, withdrawal, reticence, and the inability to interact on a personal level; moreover, the plaintiff failed to show that the medical school dismissed him "solely" due to disability), *aff'd*, 131 F.3d 135 (4th Cir. 1997); Murphy v. Franklin Pierce Law Ctr., 882 F. Supp. 1176 (D.N.H. 1994), *aff'd without published opinion*, 56 F.3d 59 (1st Cir. 1995) (finding that student with vision impairment was not discriminated against solely due to disability when she was dismissed due to poor performance notwithstanding accommodations provided—reduced course load, opportunity to retake a test, extra time to complete other examinations); Villanueva v. Columbia Univ., 746 F. Supp. 297 (S.D.N.Y. 1990), *aff'd*, 916 F.2d 709 (2d Cir. 1990) (affirming summary judgment in a case where a former graduate student with cerebral palsy brought action claiming that she was discriminated against when she was dismissed from a Ph.D. program consistent with the College handbook; she had twice failed her written qualifying examination in sociomedical sciences research methods); University of Southwestern Louisiana, 4 Nat'l Disability L.

Academic dismissals are generally for only one academic year (i.e., one Fall and one Spring semester), although reapplication and acceptance are generally required.[41]

Once dismissed, some former students have filed formal administrative complaints or suits alleging that the basis for their dismissals was their respective disabilities. No doubt, much of the academic difficulty students with learning and selected other disabilities face is, in fact, disability related. But, poor performance and inadequate academic progress also may be associated with poor study habits unrelated to the disability, a lack of prerequisite courses or knowledge, limited effort, poor attendance, family and financial circumstances, outside employment, and the like.[42] Regardless whether poor performance is in part disability related or caused by other factors, all students still must meet academic requirements—the

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Rep. 357 (OCR 1993) (holding that appropriate academic adjustments had been provided a student with Scotopic Sensitivity Syndrome and a learning disability, that the student benefitted from the adjustments, and that the student's failure was not due to inadequate accommodation); University of Colorado, 4 Nat'l Disability L. Rep. 211 (OCR 1993) (concluding that the University should have provided a nursing student with rheumatoid arthritis with a tape recording transcriber or effective alternative; however, the student's dismissal was based on deficient academic performance rather than national origin or disability); Whittier Coll. Sch. of Law, 4 Nat'l Disability L. Rep. 183 (OCR 1993) (finding that a law school had provided a student with a form of dyslexia—a developmental expressive writing disorder—with the only academic adjustment she had requested prior to dismissal—i.e., additional time for testing; the student was dismissed because she failed to meet academic standards); University of Pennsylvania, 1 Nat'l Disability L. Rep. 323 (OCR 1991) (finding that the University adequately accommodated a student with a cardiac dysfunction by allowing her to take a leave of absence, adjusting time frames, and substituting course work for an examination; the student's failure was not due to inadequate accommodation).

[41] *See, e.g.*, Doe v. Vanderbilt Univ., No. 96-5561, 1997 U.S. App. LEXIS 34104 (6th Cir. 1997) (affirming summary judgment for the University; the plaintiff had a Bipolar Disorder and withdrew from the University prior to being academically dismissed for poor aggregate performance—he later was denied re-admission as a better-qualified student was selected for the last remaining position in the medical school).

[42] *See, e.g.*, Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) (upholding the academic dismissal of a student who alleged that a variety of personal and family problems in part were responsible for his poor performance); Mid-America Nazarene Coll., 2 Nat'l Disability L. Rep. 105 (OCR 1991) (concluding that a student's poor performance was the result of poor attendance, rather than disability; the student had a developmental reading disorder).

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lowering of standards is not required.[43] Furthermore, the fact that the dismissed student qualifies as disabled, without more, does not support a claim that the college illegally discriminated.

Suits contesting academic dismissals often allege that adequate due process procedures had not been followed; that college officials discriminated against the student due to the student's disability; or that accommodations and/or modifications had not been provided. Such cases tend to be difficult for students to win, as deference is generally provided to college officials (see extended discussion in Chapter 5). Deference is not absolute, however, as the courts still have the final responsibility to determine whether disability law has been violated.

Deference

Two cases in the Ninth Circuit are particularly illustrative of the deference standard and its application in disability cases. In the first case, *Zukle v. Regents of the University of California,*[44] a medical school student with a learning disability in reading had been placed on probation, given her record of low achievement.[45] Even when she took several courses for a second time, her grades remained low and she struggled academically, scoring at the 5th percentile on the national licensing examination. The medical school allowed her to interrupt her OB-GYN clerkship to take a six-week review course paid for by the medical school. The course helped, in that the plaintiff later passed the test. When she completed the course and returned to campus, she requested that she be permitted to start a second clerkship in family practice and complete the first clerkship at a later time. This request was denied and she completed the OB-GYN clerkship only to receive another low grade and placement once again on probation. During probation she failed her medicine clerkship. Given her aggregate academic performance, the Promotions Board determined that she did not have the skills and knowledge that were required to competently practice medicine and dismissed her from the University. The dean of the medical school also observed that "[t]here is a certain point when everyone has to be able to respond in the same time frame. A physician does not have extra time when in the ER, for example. Speed of appropriate reaction to crisis is essential."[46] When the student eventually sued, the medical school did not contest the fact that she was disabled, or that the medical school received federal financial assistance (for section 504 purposes) and was a public entity (for title II ADA purposes). What was disputed was whether the plaintiff was qualified.

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[43] Dixon v. Regents of the Univ. of New Mexico, No. 99-2245, 2000 U.S. App. LEXIS 25139 (10th Cir. Oct. 6, 2000) (upholding summary judgment for the University; it had dismissed a student from medical school given her poor academic performance when viewed in the aggregate).

[44] Zukle v. Regents of the Univ. of California, 166 F.3d 1041 (9th Cir. 1999).

[45] *See also* Anderson v. University of Wisconsin, 841 F.2d 737 (7th Cir. 1988) (holding that a minority student failed to show that he was discriminated against due to race or disability when a law school denied his re-admission; he previously had performed poorly while in the program, possibly due to alcoholism).

In reaching its conclusion, the court was willing to give deference to the institution, absent proof that the application of its standards served no purpose other than to discriminate against the disabled. Academic decisions should not be allowed to disguise discriminatory requirements, given that the institution has a responsibility to seek reasonable accommodations and to provide a factual record indicating that it conscientiously carried out this duty.[47] The court observed that each case is unique, although perhaps similar, and must be evaluated in its entirety. In Zukle's case, she had been provided double time on examinations, notetaking services, textbooks on audio cassettes, permission to retake courses, and the opportunity to proceed on a decelerated basis, yet consistently failed to meet academic requirements. The only accommodation that had been denied was the interruption of the OB-GYN clerkship, which the institution argued had never been permitted and would (1) require a substantial modification of its program given the necessary sequencing of activities and tests and (2) unfairly advantage the plaintiff. As a result of the above, the court held that the plaintiff failed to show that she was otherwise qualified.

Seven months later, the same court examined a substantially similar case, but came to a different conclusion. In *Wong v. Regents of the University of California*,[48] the plaintiff had a hearing impairment that required him to ask people to slow their speech or repeat, use a tape recorder, and double check his understanding when given verbal instructions or information. When he had been given a decelerated schedule, with extra time to read and study, his performance improved markedly. During his third year he requested that he be given eight weeks off between each clerkship, but was denied. His performance declined. He was eventually dismissed and filed suit.

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[46] *Id.* at 1044.

[47] *Id.* at 1048.

[48] Wong v. Regents of the Univ. of California, 192 F.3d 807 (9th Cir. 1999).

In reaching its decision, the court first noted that although plaintiff at one time had succeeded while working within a decelerated schedule, that fact alone was insufficient to draw the conclusion that such a schedule must be continued, given that courses, requirements, and clerkships differ. However, at a minimum, medical school officials should have documented that they conscientiously exercised professional judgment in considering the feasibility of the requested modification. In the present case, the necessary professional discretion had not been exercised, although the student's overall record did indicate that he had difficulty comprehending verbal information, responding accurately to questions posed to him on the wards, thinking on his feet, and relating to patients and staff. Medical school officials argued that such behavior cannot be remediated by additional time to read or by allowing extended breaks between clerkships.

Given the conflict between the student's apparent success with accommodation and the school's position that further accommodation would not permit the student to meet minimum standards, the court refused to uphold the prior grant of summary judgment. It reasoned that a reasonable jury could conclude that the school's decision was arbitrary and unrelated to academic standards. As a result, the ruling by the lower court on behalf of the medical school was reversed. If nothing else, this case emphasizes the importance to consider alternative accommodations and modifications, to document everything (e.g., explanations of why each requirement is an essential component, why one accommodation was selected over another or denied outright, why dismissal was warranted), and to use professional judgment. Documenting that professional judgment was used should result in deference being proffered by the courts.

Failed to Follow Established Procedures

Although there are extensive procedural requirements when engaged in disciplinary hearings, the process that is due is decidedly less when it comes to academic hearings. Nevertheless, it is prudent to prepare and promulgate (through course syllabi, college catalogues, program materials, orientation, advisement, etc.) admission, course, degree, and licensure requirements (e.g., GPA, performance on a national standardized examination, performance on a locally developed and administered examination, successful completion of a requisite number of courses or course credits, successful completion of clerkships, internships, or externships); to assess each student's compliance with these requirements in a nondiscriminatory and nonarbitrary[49] manner; to keep students abreast of their performance (e.g., by calculating GPA and totalling course credits on each semester's "report card"); to inform students of the possible repercussions of not meeting minimum standards;[50] to place students on probation who fail to progress satisfactorily; to uniformly apply the published standards; to provide an informal review (between the student and the program coordinator or small panel of professors—no attorneys) from the initial decision to dismiss (often the initial decision is automatic—perhaps even computer generated when the student falls below an established GPA);[51] and to give each student the opportunity to fully express his or her position (either in writing, orally, or both). Always follow whatever procedures have been adopted by the college.[52] If over time the established procedures prove cumbersome or unmanageable, change them, but do not fail to comply during the interim. And finally, ensure that all initial and appeals decisions are based on a conscientious and careful consideration of the student's record.[53] Do not advantage or disadvantage (discriminate for or against) any student because of disability, race, religion, gender, or any other impermissible classification.

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[49] In a related "conduct" case decided under contract law, the First Circuit, in Russell v. Salve Regina Coll., 938 F.2d 315 (1st Cir. 1991), reviewed a claim where a nursing student was forced to withdraw after her junior year solely because she failed to meet a weight requirement imposed by the College. The College claimed that the extent of her obesity (over 300 pounds) was a violation of the program's regulation requiring nursing students to be in good health. In an effort to comply with the College's health requirement, Russell signed a statement committing herself to a loss of two pounds per week in order to remain in the program. However, by the end of that year she had failed to maintain any appreciable weight loss. As agreed, Russell then left the college, completed her nursing degree elsewhere (although an additional year of study was required given limitations on transfer credit), and filed suit contending that she was not only discriminated against due to her obesity, but also had been emotionally abused. In applying the contract law doctrine of substantial performance, the First Circuit held that the over-weight nursing student substantially met her obligation to the College in regard to attendance, participation, and performance, but that the College failed to meets its obligation when it required her to withdraw from its program. [The court refused to consider whether Russell's obesity qualified as a disability under § 504 because the College, being a nonrecipient, was not subject to regulation.]

[50] For a related case *see* Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978) (upholding the academic dismissal of a medical school student who had claimed that she had received inadequate due process when she was dismissed; the Court upheld the limited procedures that were used and noted that the student had been kept fully informed of the faculty's dissatisfaction with her progress).

[51] Mauriello v. University of Med. and Dentistry of New Jersey, 781 F.2d 46 (3d Cir. 1986) (upholding academic dismissal of a student who had alleged both procedural and substantive due process violations; noting that an informal "give and take" between the student and the administrative body that dismissed her and the exercise of professional judgment are all that are required in an academic dismissal).

[52] Leacock v. Temple Univ. Sch. of Med., No. 97-7850, 1998 U.S. Dist. LEXIS 18871 (E.D. Pa. Nov. 25, 1998) (upholding the academic dismissal of a student who the court noted had been dismissed using the guidelines set forth in the medical school handbook).

In a case examining disability law as well as the Due Process Clause, *Dixon v. Regents of the University of New Mexico*,[54] the Tenth Circuit upheld the dismissal of a medical school student based on the "totality" of her academic performance, notwithstanding the fact that she eventually passed each of her required exams and courses (some courses had to be retaken; one final exam was taken three times). The Committee on Student Promotions and Evaluations concluded that she was unsuitable for the degree and did not possess the qualities and skills necessary to be a safe and effective physician. That decision was upheld by the Education Council and by the dean. The former student then claimed violations of the ADA and section 504, as well as procedural and substantive due process. The circuit court held that the plaintiff failed to show that her documented depression qualified as a disability or that it substantially limited any particular major life activity. Accordingly, the disability claims were dismissed.

In regard to the due process claims, the court noted that procedural due process requires that the process be "fair" while substantive due process guarantees that the public entity not be "arbitrary" regardless how fair the procedures. In the present case, the court found that the University's decision to dismiss the plaintiff was "academic" in nature, that no additional due process was necessary (i.e., plaintiff already had the opportunity to present written evidence and to make oral statements to University officials), and that no actual hearing was required for academic dismissals.[55] Moreover, the court opined that the decision to dismiss clearly did not

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[53] *See, e.g.*, Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) (concluding that even if a medical student had a property interest in his continued enrollment in the program that was protected by the Due Process Clause, his dismissal was not arbitrary and was based on a conscientious and careful consideration of his record).

[54] Dixon v. Regents of the Univ. of New Mexico, No. 99-2245, 2000 U.S. App. LEXIS 25139 (10th Cir. Oct. 6, 2000), *cert. denied*, 121 S. Ct. 1361 (2001).

[55] *See also* Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78, 86-90 (1978); Trotter v. Regents of the Univ. of New Mexico, 219 F.3d 1179 (10th Cir. 2000).

"shock the conscience of federal judges" or qualify as arbitrary or lacking a rational basis. As a result, the substantive due process claim also failed.

Disability Discrimination

To be discriminated against due to disability, the student must have a qualifying disability that substantially limits a major life activity, have a record of such an impairment, or be treated as though he or she has an impairment. Then, the college needs to have discriminated against the student due to that disability (or perceived disability); adverse treatment alone will not qualify as discrimination. The issue of whether the student qualified as disabled was addressed in *Schuler v. University of Minnesota.*[56] In that case, the Eighth Circuit reviewed a claim filed by a dismissed Ph.D. student who had failed her comprehensive oral examination for the second time. She complained that she was not provided with adequate notice of the criteria on which her performance was to be evaluated; that there was no reviewable record of oral examination questions and answers; and that she was misled by her advisor as to the content of the test. In addition, she objected to the fact that her former advisors made up the majority of the review committee for her grievance hearing. All of these complaints were secondary to her primary claim, however, that she had been treated as though she had a disability, given her test-taking phobia, neurotic dependency upon her professors, and an "inability to communicate with her professors due to her right-brain dominance and their left-brain dominance."[57] The court found plaintiff's disability claim to be meritless—she was not otherwise qualified and the impairments for which she based her claim were found to be "insufficient."[58]

Where the student is proven to be disabled, it still must be shown that the disability was in fact the basis for the adverse treatment. Numerous students who have been academically dismissed from college have, curiously, claimed disability discrimination even though they never informed officials of their respective disabilities; others were unaware themselves that they had a disability until some time after their removal—months or even years. Obviously, to be guilty of discriminating against a student due to his or her disability, college officials first must have known of the disability.[59] In a related case, *Aloia v. New York Law School*,[60] the plaintiff was a law school student with a central nervous system metabolic disorder who blamed his instructors for having failed to diagnose his disability as, in his view, they had ample opportunity to "witness the symptoms suffered" of his "occasional manifestations."[61] The district court noted that plaintiff's law professors, although "learned in law but lay persons in medicine,"[62] were unlikely to be able to detect an internally manifested disorder that the plaintiff admitted he tried to conceal. Given this failure to support the existence of a qualifying disability the plaintiff was not accommodated. His academic performance was poor and he was eventually dismissed. That dismissal was upheld in court.

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[56] Schuler v. University of Minnesota, 788 F.2d 510 (8th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987).

[57] *Id.* at 516.

[58] *Id.*

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[59] Scott v. Western State Univ. Coll. of Law, No. 96-56088, 1997 U.S. App. LEXIS 9089 (9th Cir., April 21, 1997) (concluding that the plaintiff was dismissed due to GPA rather than an alleged, undocumented disability); Nathanson v. Medical Coll. of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991) (denying summary judgment in part because fact issues remained whether the plaintiff was disabled and therefore required accommodation); Rossomando v. Board of Regents of Univ. of Nebraska, 2 F. Supp. 2d 1223 (D. Neb. 1998) (concluding that the former orthodontics student with alternating strabismus, a congenital vision problem, was not discriminated against due to disability when she was dismissed from the program; the student had not informed the institution that she had a disability and needed accommodation); Leacock v. Temple Univ. Sch. of Med., No. 97-7850, 1998 U.S. Dist. LEXIS 18871 (E.D. Pa. 1998) (granting summary judgment upholding a student's dismissal from a medical school based on poor performance; only when told that she would be dismissed did the plaintiff propose that she may be disabled); Goodwin v. Keuka Coll., 929 F. Supp. 90 (W.D.N.Y. 1995) (determining that a student was dismissed from an occupational therapy program due to poor performance during two field placements and not due to an alleged, undocumented disability); California State Univ., Sacramento, 4 Nat'l Disability L. Rep. 359 (OCR 1993) (finding that a student with Anxiety Disorder and major depression had not provided the University with notification of her disability; the Master Teacher supervising her student teaching felt that the complainant lacked essential skills and that additional time would not make her a better teacher; the student's dismissal was not therefore based on disability); Linn-Benton Cmty. Coll., 1 Nat'l Disability L. Rep. 86 (OCR 1990) (finding no § 504 violation when, for academic reasons, a college dismissed a student suffering from schizophrenia, paranoia, and a behavioral disorder from a nurse's assistant program; at the time grades were assigned, the College had no knowledge of the student's disabilities; moreover, before she would be allowed to retake the clinical portion of the course she failed, she would have to submit additional information regarding her disabilities).

[60] Aloia v. New York Law Sch., No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769 (S.D.N.Y. July 25, 1988).

[61] *Id.* at 6.

[62] *Id.*

For the college to become officially aware of the disability, the student is responsible for providing designated college officials with the necessary documentation prepared by properly licensed professionals—see Chapter 2.[63] Ideally, included within the student's docket will be requests for specific accommodation to assist SDS officials in the selection and provision of adjustments.[64] If officials then fail to inform instructors or administrators with a "need to know," lose the record, or disregard the documentation, the likelihood of success for the student increases dramatically.

Failed to Properly Accommodate or Modify

Once college officials conclude that a student has a qualifying disability, they are required to make appropriate and reasonable accommodations and modifications available that will enable the student to participate within the program on a nondiscriminatory basis. At times students who fail to meet academic requirements will purport that their performance was caused at least in part by the institution's failure to provide the needed accommodations or to make legitimate modifications. Some of these plaintiffs have succeeded[65] while others have failed.[66]

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[63] Rosenthal v. Webster Univ., No. 98-2958, 2000 U.S. App. LEXIS 23733 (8th Cir. Sept. 25, 2000) (finding that the plaintiff failed to provide the University with documentation that he was bipolar until after he had been suspended; also, his suspension was not based on his disability, but rather was due to carrying a gun and threatening to use it).

[64] Rossomando v. Board of Regents of Univ. of Nebraska, 2 F. Supp. 2d 1223, 1230 (D. Neb. 1998) (observing that plaintiff, who had been suspended from a postgraduate orthodontic program due to poor patient management and deficient technical skills, failed to inform officials of her disability or the need for specific accommodations, beyond the wearing of loops to magnify her work when examining clients; she suffered from alternating strabismus which required her to look with one eye and then the other but could not look with both eyes at once, thereby causing a problem with depth perception).

[65] *See, e.g.*, Lane v. Pena, 6 Nat'l Disability L. Rep. 1 (D.C. 1994) (holding that the United States Merchant Marine Academy failed to attempt to reasonably accommodate a cadet with diabetes prior to disenrolling him from its program).

[66] *See, e.g.*, University of California at San Diego, 10 Nat'l Disability L. Rep. 304 (OCR 1997) (holding that the University dismissed a student due to his poor performance rather than to hepatitis, depression, and a genetic blood clotting disorder; moreover, the student failed to request a specific accommodation for his disabilities); Northern Michigan Univ., 3 Nat'l Disability L. Rep. 250 (OCR 1991) (finding that a teacher education student with a learning disability was not arbitrarily denied adjustments since she had not provided adequate evidence that additional adjustments were required).

Accommodations

Colleges have responded to claims of inadequate accommodation by arguing that appropriate accommodations in fact had been provided,[67] that no accommodation was possible given the type of the activity and nature of the disability,[68] or that providing the accommodation would result in undue hardship or substantially alter the nature of the program.[69] A district court in Georgia, in *Ellis v. Morehouse School of Medicine*,[70] upheld the dismissal of a medical school student with dyslexia who failed to meet academic requirements although some adjustments had been provided by the University (decelerated first-year program and double time to complete examinations). The plaintiff also was guilty of a misuse of the school's postage system and had made a D in medicine and an F in surgery. He complained that his attending physicians did not know that he was learning disabled and failed to accommodate him. The University argued, and the court agreed, that no further accommodation was possible because in third- and fourth-year clinicals, as well as actual practice, doctors are required to process information promptly and accurately, efficiently integrate information received from patients within their own "fund of knowledge," competently diagnose ailments, propose courses of treatment, and follow established protocol.

Similarly, the Fifth Circuit, in *McGregor v. Louisiana State University Board of Supervisors*,[71] reviewed a case where a law school student with disabling head and spinal injuries was denied advancement to the third year. One professor had given him virtually unlimited office hours, while the program provided him with a handicapped parking permit, tutorial assistance, and additional time to complete his criminal law examination. Although the plaintiff accepted each of the aforementioned accommodations, he proposed that the program inadequately addressed his disability (i.e., the fatigue and pain he was experiencing) which impaired his ability to learn. He had requested that the law school allow him to be a part-time student, permit him to take examinations at home, and lower the mandatory GPA requirement in his instance. The court held that the student's requests for accommodation would result in a fundamental alteration of the school's academic standards and constitute preferential treatment.

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[67] Stern v. University of Osteopathic Med. and Healtn Scis., 220 F.3d 906 (8th Cir. 2000) (affirming lower court's grant of summary judgment to the University where a student with dyslexia was found to have been adequately accommodated).

[68] Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979) (finding that a nurse with hearing impairments could not meet program clinical requirements without substantial alterations to the program); National Univ., 5 Nat'l Disability L. Rep. 82 (OCR 1993) (concluding that the dismissal of a student from the student teaching program was based on his inability to assert himself in the classroom and to maintain order; no academic adjustment would enable the complainant to be successful).

[69] Doe v. Vanderbilt Univ., No. 96-5561, 1997 U.S. App. LEXIS 34104 (6th Cir. Nov. 26, 1997) (concluding that to require the University to retain an academically unqualified student in its medical school would fundamentally alter its academic standards); California State Univ., Sacramento, 8 Nat'l Disability L. Rep. 372 (OCR 1996) (determining that the denial of an additional one-year extension was not due to disability but to nondiscriminatory criteria; the request would have substantially altered the program).

[70] Ellis v. Morehouse Sch. of Med., 925 F. Supp. 1529 (N.D. Ga. 1996).

[71] McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993).

Modifications

As discussed in Chapter 6, the ADA requires public and private colleges to modify requirements that tend to discriminate based on disability when they are not essential to the program's integrity. Not only is this the case in admissions (e.g., mandatory math and foreign language courses), it also is true for program and course requirements. Where a specific requirement is contested, the plaintiff must show that it discriminates based on disability and serves no legitimate purpose.

As would be expected, courts have shown reluctance to waive program, course, field, internship, and clinical requirements necessary for degree, certification, and licensure programs. In *Doherty v. Southern College of Optometry*,[72] a plaintiff with retinitis pigmentosa (RP) filed claims under section 504 and section 1983 when the College refused to confer his degree due to his failure to meet clinical proficiency requirements. When Doherty applied to the College, he was examined by two faculty members and an independent physician, all of whom indicated that he might have difficulty meeting program requirements, but that it was not impossible for him to do so. [The RP limited his visual field to six and ten degrees in his right and left eyes, respectively.] However, he neglected to reveal to college officials that in addition to RP he suffered from neurological difficulties that affected his motor skills, sense of touch, and manual coordination. During the course of the plaintiff's first year, he failed to develop the requisite skills necessary for a required fourth-year externship because he could not properly use various optical instruments. Both the Admissions Committee and the Board of Trustees denied Doherty's request to have the requirement waived, but he was granted an additional academic quarter to practice with the instruments and to prepare for a retest, which he again failed. Doherty argued that he was denied the degree solely by reason of his disability and that the test was a pretext for discrimination, particularly since use of the instruments was not required for the program prior to his matriculation. He further claimed that the College could have made reasonable accommodation for his disability by waiving the requirement because proficiency on the contested instruments in his view was not necessary to practice optometry, noting that six of fifty states do not even permit their use and that many optometrists in states where they are legal opt not to use them.

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[72] Doherty v. Southern Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988), *reh'g denied, cert. denied*, 493 U.S. 810 (1989).

The court rejected all of plaintiff's arguments. Most importantly, the court determined that Doherty was not otherwise qualified because, in failing to demonstrate adequate proficiency with the instruments, he showed that he was not qualified in spite of his disability. Furthermore, the College was found to have the right to make changes in its curriculum as long as the changes were not arbitrary or capricious. In the present case, the College amended its program when the plaintiff was a freshman. The changes did not affect him until his fourth year (i.e., the student had to pass a pathology clinic proficiency requirement in order to qualify for an externship). And finally, the court concluded that the College did not fail to accommodate the student when it refused to modify its program by waiving the proficiency requirement and noted that an educational institution was not required to eliminate course requirements that were reasonably necessary for proper use of the degree which was to be conferred at the end of a course of study.[73]

The Sixth Circuit also confronted a case where a request for waiver was sought, *Pangburn v. Northern Kentucky University*.[74] The plaintiff had been an elementary education major but failed to earn a degree. She received only Fs and Ds in a basic math course, although she took the course six times; a minimum grade of C must be earned to meet program requirements. The plaintiff accepted seven accommodations during both her fifth and sixth attempts and rejected four others; accommodations had not been offered earlier as the plaintiff had not been tested for a learning disability until after the fourth attempt. She argued that the math course was not necessary for her to teach K-4 students and should therefore be dropped or, in the alternative, that her D grade be accepted to satisfy the requirement. The Sixth Circuit concluded that the math course was an essential part of the program—it was part of the curriculum established by the College and approved by the state. Furthermore, the College was not required to lower its standards to permit the plaintiff to pass.

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[73] *Id.* at 575.

[74] Pangburn v. Northern Kentucky Univ., No. 99-5474, 2000 U.S. App. LEXIS 6413 (6th Cir. March 23, 2000), *cert. denied*, 531 U.S. 875 (2000).

Guidelines for the Practitioner

Neither section 504 nor the ADA requires colleges to do away with legitimate academic requirements and codes of conduct, or to retain violent or dangerous students. What is required is that students with disabilities be provided with reasonable accommodations and appropriate modifications and be given the opportunity to succeed or fail on a nondiscriminatory basis. Academic requirements must be both reasonable and essential to the program; they may not be arbitrary or used in such a way as to deny students with disabilities equal access and opportunity. To maintain academic and behavioral standards, yet provide proper accommodation, the following guidelines are recommended.

Disciplinary

(1) With counsel, develop a student handbook that includes a code of conduct.

(2) Uniformly apply all policies to all students.

(3) Provide written charges and a timely hearing where there is an alleged violation.

(4) Ensure that the hearing officer was not a party to the dispute (i.e., should be disinterested).

(5) Ensure that the student has a fair opportunity to be heard.

(6) Formalize the procedures *only* when severe violations of criminal law have been alleged (e.g., permit the student to be accompanied by counsel).

(7) Follow all established procedures.

(8) Provide one administrative appeal for disciplinary decisions.

(9) Ensure that appeals officers were not a party to the dispute or participated in the original decision.

(10) Keep thorough records of disciplinary hearings and rationales.

Academic

(1) Establish, publish, and disseminate college, program, and professor academic expectations.

(2) Uniformly apply all standards and requirements, even at the individual professor level (e.g., all students should receive the same opportunity for extra credit; only one grading scale should be used for all students; all students should be given the same assignments and options).

(3) Grades should reflect performance on the assignment and not be biased for or against students with disabilities.

(4) Do not lower standards based on the belief that it is required by disability law.

(5) Provide appropriate and reasonable accommodations to otherwise qualified students with disabilities.

(6) Provide accommodations and modifications timely and efficiently.

(7) If requested, provide the dismissed student with the opportunity to represent his or her position—this may be either in writing or orally, but no formal hearing is needed. An informal discussion between college official(s) and the student will suffice.

(8) Provide one informal administrative appeal for academic decisions.

(9) Keep thorough records of academic decisions and rationales.

10

Disability Discrimination in Employment

Throughout history, persons with disabilities have been victims of employment discrimination, even when fully qualified and capable of performing all job-related responsibilities. Employers often were reluctant to hire persons with disabilities for fear that the job functions would not be performed well or on time, or that the costs of accommodation would be burdensome or at least could become so. Federal laws requiring nondiscrimination have been only partially successful in assuring equal employment opportunity for persons with disabilities as their unemployment figures are higher and their salaries, on average, are lower than for their nondisabled peers.[1]

This chapter examines the legal issues regarding disability discrimination in employment and provides guidelines for employers to follow in the employment process. The discussion will be relevant to higher education practitioners in two capacities: (1) in the direct employment of persons with disabilities and (2) in the education and advisement of students with disabilities as they prepare to enter the labor market. A review of related federal law is provided prior to an examination of the employment process.

Constitutional and Statutory Protection

Prior to 1973, the primary federal law prohibiting disability discrimination in employment was the Fourteenth Amendment. That law requires state actors (e.g., public colleges) to provide equal protection and due process for all persons, including those with disabilities. Moreover, the Rehabilitation Act (RA) and the Americans with Disabilities Act (ADA) provide protection specifically for employees and applicants with disabilities. These two statutes are relied on heavily today in part because courts prefer to resolve matters based on specific, narrowly tailored, federal statutes when possible (as compared to more general constitutional provisions) and in part due to the difficulty of prevailing in a Fourteenth Amendment case (i.e., the difficulty for plaintiffs to prove intent where facially neutral policies or practices are involved; the difficulty of showing that there is no rational basis where practices or policies

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[1] Tony Coelho, *NIDRR's Long Range Plan—Employment Outcomes Research*, 1, http://www.ncddr.org/rpp/emp/lrp/lrp_ov.html (2001).

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are facially discriminatory—see Chapter 1 for a thorough discussion of applicable Fourteenth Amendment standards). Possible limitations imposed by the Eleventh Amendment, the RA, and the ADA are reviewed below.

Eleventh Amendment Immunity

The Eleventh Amendment to the Federal Constitution (adopted in 1798) states that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Interestingly, it does not explicitly limit suits filed against a state by a citizen of that state. Notwithstanding a void of historical intent to support its position, the Supreme Court has extended the Amendment's protection in such cases to include suits filed by state residents.[2] Accordingly, the state may claim immunity when sued by any private individual for monetary damages in federal court. Note that Eleventh Amendment immunity does not protect city (e.g., a city college), community (e.g., a community college), or county employers; it only protects those that qualify as "state" employers (e.g., state colleges).

Under narrow circumstances, Congress too has the authority to affect the reach of the Eleventh Amendment. Unlike the courts, which have expanded the Amendment's coverage, Congress often has made the effort to abrogate state immunity. To do so, Congress must act unequivocally, pursuant to a valid grant of constitutional authority. Such authority is provided in section 5 of the Fourteenth Amendment; this section gives Congress the power to enforce the substantive guarantees found in section 1 (i.e., due process and equal protection).

To prevail under a statute such as title I of the ADA where Congress has attempted to limit immunity defenses,[3] the plaintiff has the burden of supporting the existence of a pattern of discrimination (in this case disability discrimination) by the state that would violate the Fourteenth Amendment (i.e., the state's action must fail to meet the rational basis standard[4]). This is a difficult task, as the plaintiff must "negative" all possible rational bases for the disputed government action. Although this burden is not impossible to carry, it can prove exceedingly difficult as most government action will meet or exceed this comparatively low threshold. In rare instances, however, no rational basis can be identified and the plaintiff will prevail. For example, in *Cleburne v. Cleburne Living Center, Inc.*[5] the plaintiff challenged a city ordinance that required those who wanted to operate a group home for mentally retarded persons to acquire a special-use permit not required of those operating an apartment house, multiple-family dwelling, retirement home, nursing home, sanitarium, hospital, boarding house, fraternity or sorority house, or dormitory. No rational basis for this distinction could be identified and plaintiff prevailed. The residents did not threaten the city's legitimate interests and the permit appeared to be based on irration-al prejudice against persons who were mentally retarded.

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[2] Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 669-670 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

[3] 42 USC § 12202 (1985).

[4] Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (applying the rational basis standard in a case dealing with facial disability discrimination).

The issue of whether Eleventh Amendment immunity may be claimed specifically in title I, ADA suits was addressed by the Supreme Court in 2001 in *Board of Trustees of the University of Alabama v. Garrett.*[6] In that case, two state employees with disabilities (one a nurse, the other a security officer) sued the state for monetary damages when their respective employers allegedly discriminated against them. After undergoing a lumpectomy, radiation treatment, and chemotherapy, the nurse returned to work, but was forced to resign from her position as a director; she then applied for and received a lower-paying position as a nurse manager. In contrast, the security guard claimed that he had been denied necessary work accommodations (i.e., transfer to a daytime shift and reduced exposure to carbon monoxide and cigarette smoke), given his chronic asthma and sleep apnea.

The primary issue on appeal to the High Court was whether, under title I of the ADA, a federal court could award monetary damages to be paid by a state employer or, in the alternative, whether the Eleventh Amendment prohibited such relief. The Court found that the award would violate the Constitution. Although examples of state discrimination were present, there was no history or pattern of irrational employment discrimination against the disabled. Much of the discrimination that was identified was either perpetrated by city or county officials, did not involve employment, or violated only the ADA and not the Fourteenth Amendment.

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[5] *Id.* Note that this case provides an example of rational basis scrutiny; it does not deal with Eleventh Amendment issues given that a city ordinance, rather than a state law, is being contested.

[6] Board of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

In providing an example of how the Fourteenth Amendment and the ADA differed, the Court opined that it might be entirely rational and, therefore, constitutional for a state employer to protect its limited resources by hiring only those employees who could access and use existing facilities; in contrast, the Court purported that the ADA requires nondiscrimination in the hiring process and is violated when employers fail to make facilities readily accessible and usable by persons with disabilities. Even with the undue burden exception under the ADA, the Court noted that the accommodation duty under the ADA far exceeded that which was constitutionally required.

Notwithstanding the fact that the Eleventh Amendment prohibits the awarding of monetary damages in claims against state employers, do not assume that persons who have been subjected to disability discrimination in employment are powerless to vindicate their rights. Title I still prescribes standards that are applicable to state employers. Said standards may be enforced in federal courts by the United States in actions for monetary damages and by employees in actions seeking injunctive relief. Furthermore, many state disability laws provide identical or at least similar coverage to that mandated by the ADA and permit monetary damages under certain circumstances. Moreover, because all public colleges are recipients of federal financial assistance, they must meet substantially similar obligations under the Rehabilitation Act—a law that at times permits the award of money damages.

Rehabilitation Act of 1973

The RA provides statutory protection for employees with disabilities in sections 503 and 504, among others. The first of these two sections applies to federal contractors and the second mandates compliance by recipients of federal financial assistance. Specifically, section 503 requires federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities in the completion of contracts of $10,000 or more.[7] Although it is difficult to project when affirmative action begins and reasonable accommodation ends, clearly affirmative action requires something more—a greater commitment to recruitment and a greater degree of accommodation. Section 503 complaints are filed with the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP). This Office investigates related charges and, where discrimination is present, attempts conciliation. If such efforts are unsuccessful, the Office may elect to withdraw progress payments, terminate the existing contract, or debar the employer from future contracts. However, there is no private right of action under section 503 (i.e., an employee may file a complaint, but may not file suit). Moreover, section 503 has a limited role in higher education. Most colleges and universities [hereafter referred to as colleges] do not qualify as federal contractors (instead, they qualify as recipients of federal financial assistance) and those that do contract are required to demonstrate compliance only within the fulfillment of the contract. As a result, a comparatively few colleges are regulated by section 503 and those that are must demonstrate compliance within only a limited portion of their operation.

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[7] 29 U.S.C. § 793.

In contrast, section 504 of the RA provides in pertinent part that no "otherwise qualified individual with a disability . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance . . . ."[8] All public and nearly all private colleges receive either direct or indirect federal financial assistance and therefore must comply with this law. Furthermore, in 1987 the RA was amended to apply institution-wide even when only a single program or activity within the organization received assistance from the Department of Education (DOE). In regard to employment, a recipient may not discriminate against a person with a disability regarding any term, condition, or privilege of employment. Related complaints are filed with the Office for Civil Rights (OCR) within the DOE. The standards used to determine whether section 504 of the RA or title I of the ADA (see discussion below) has been violated in a complaint alleging employment discrimination are the same.[9]

Americans with Disabilities Act of 1990 (ADA)

Before the ADA[10] became law, only state law or local ordinance prohibited a private, nonrecipient employer from discriminating against the disabled. To fill this apparent void Congress passed the

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[8] 29 U.S.C. § 794(a)

[9] 29 U.S.C. § 794(d).

[10] 42 U.S.C. § 12101 *et. seq.* Although the ADA uses the term "Americans," the law does not require that persons actually be citizens of the United States—the ADA applies to all regulated employers and their employees.

ADA in 1990. As discussed in previous chapters, ADA definitions for *individual with a disability*, *reasonable accommodation*, *undue hardship*, and the like are operationally the same as those provided under section 504. Title I of the ADA provides great specificity regarding preemployment activities as well as terms and conditions of employment and prohibits activities such as discrimination in job descriptions, recruitment, advertising, job application procedures and hiring; upgrading, promotion, and the award of tenure; demotion, transfer, layoff, suspension, termination, recall rights, and rehiring; compensation and benefits; job assignments and classifications; organizational structures, lines of progression, and seniority lists; sick and other forms of leave; training, professional meetings, conferences, and other related activities; and social and recreational activities.[11] The Equal Employment Opportunity Commission (EEOC) reviews related complaints. Typically, charges must be filed within 180 days of the alleged violation. [This time limit may be extended in "work-sharing states" to 300 days if the complainant first files a timely charge with a state or local agency.[12]] Once filed, the EEOC has 180 days to investigate. If the workload of the Commission does not permit a timely review, it will issue a "right to sue" letter, permitting the claimant to pursue the action in court. Most courts agree that plaintiffs must exhaust administrative remedies prior to suit.[13] Furthermore, prior to filing either a complaint or suit, the EEOC strongly encourages employees to address their concerns directly with employers, so that disputes can be resolved informally and internally whenever possible. When that does not work, the EEOC supports the use of alternative resolution techniques (e.g., mediation).

In reviewing a disability claim under section 504 or title I, the courts must determine whether either of the laws applies to the employer and whether the plaintiff qualifies as both disabled and qualified. These and other issues related to the hiring process, reasonable accommodation, terms and conditions of employment, adverse employment decisions, and retaliation are examined in this chapter.

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[11] 29 CFR § 1630.4.

[12] 42 U.S.C. §12117; 42 U.S.C. § 2000e-5(e)(1). *See also* Maynard v. Pneumatic Prods. Corp., 233 F.3d 1344, n. 3 (11th Cir. 2000) (noting the 300-day exception to the 180-day requirement).

[13] *See, e.g.*, Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001); Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001); Schmidt v. United States W. Communications, No. 99-2338, 2001 U.S. App. LEXIS 731 (10th Cir. Jan. 19, 2001); Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299 (6th Cir. 2000); Ansley v. Varsity Transit Inc., 229 F.3d 1135 (2d Cir. 2000); Simpkins v. Raines, No. 00-7135, 2000 U.S. App. LEXIS 23685 (D.C. Cir. Aug. 23, 2000); Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275 (1st Cir. 1999).

Qualifying as an "Employer"

Under section 504, all recipients of federal financial assistance are prohibited from discriminating against persons with disabilities, while under the ADA, compliance is required of employers with fifteen or more employees who work twenty or more calendar weeks in the current or preceding year. The first of these criteria (i.e., recipient status) is fairly easily determined—either the employer receives direct (e.g., a research grant) or indirect (e.g., student loans) federal financial assistance from the DOE or does not. Qualifying aid does not include procurement contracts, however, as the Department does not consider such contracts to be "assistance."[14] Accordingly, the RA standard appears straightforward; the same cannot be said for that used under the ADA.

Although the ADA's fifteen-employee criterion is seemingly direct and succinct, its application has been complex. For example, if a college were to have fourteen, eight-hours-a-day/five-days-a-week kitchen positions filled by fourteen different people for at least twenty weeks during the year, the employer would not be regulated by the ADA; if that number were increased to fifteen, the employer then would be covered. Real life is seldom so simple, however. What if two of the original fourteen positions were filled by part-time personnel (i.e., a total of sixteen employees covering fourteen positions)? Or, what if all fourteen positions were part-time (i.e., twenty-eight or more positions)? Moreover, what if some employees worked on an on-call basis when others were ill or had left work, or if they worked only two hours per day (e.g., in a college cafeteria during lunch)? What if those "on call" were never called, yet were subject to being called all year? Also, what if the fifteenth employee worked twenty weeks, but two or more of the weeks represented paid or unpaid vacation, paid or unpaid sick leave, or even personal unpaid leave?

The Supreme Court addressed this issue in *Walters v. Metropolitan Educational Enterprises*[15] where it adopted what has been termed the "payroll method." All that is necessary under this approach is to determine when the employee began employment during the year and when he or she left (if at all). The person is counted as an employee for each working day after being hired and before leaving. If fifteen or more workers are on the payroll for twenty or more weeks during the year (or preceding year), the employer is covered. It is of no relevance whether the employee worked partial days, every other day, or was on call, leave, or vacation. However, employees who begin or depart in the middle of a week do not count toward the total for that particular week.[16] Much to the disdain of small companies, this interpretation has significantly increased the number of employers now covered under a variety of federal laws. Although *Walters* is a title VII retaliation case, the definition established by the Court also has been applied to ADA cases given the similarity of wording and definitions within the two statutes.[17] Moreover, although the EEOC is not empowered to require the payroll method under either title VII or the ADA, it has adopted that approach under the Age Discrimination in Employment Act of 1967,[18] a law applicable to employers with twenty or more employees. Similarly, the Department of Labor requires use of the payroll method under the Family Medial Leave Act of 1993,[19] although the number of employees required for compliance under that law is fifty. Since *all* colleges have more than fifteen employees, irrespective of the method used for counting, they are required to comply with title I of the ADA.

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[14] 34 CFR §104.3(h). However, if a procurement contract is for $10,000 or more, the contractor would be responsible for compliance with § 503 of the RA, which requires nondiscrimination by federal contractors and affirmative action on behalf of persons with disabilities.

[15] Walters v. Metropolitan Educ. Enters., 519 U.S. 202 (1997).

Qualifying as *Disabled* and *Qualified*

In an employment context, to qualify as *disabled* an applicant or employee must have a physical or mental impairment that substantially limits one or more major life activities,[20] have a record of impairment[21] (e.g., periodically hospitalized due to tuberculosis[22]), or be regarded as having an impairment.[23] An applicant or employee may support a claim that he or she was "regarded as having a disability" by showing that a covered employer (1) mistakenly believed (perhaps through rumor or unfounded stereotypes) that the applicant or employee had an impairment that substantially limited a major life activity (e.g., when the person is HIV positive, but does not have AIDS or any type of current physical impairment limiting

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[16] *Id.* at 211. *See also* Ramsey v. 801 Credit Union Corp., No. C-3-94-183, 1997 U.S. Dist. LEXIS 23750 (S.D. Ohio, Feb. 18, 1997) (noting that an employee who begins in the middle of a week will not be included in the tally for that week).

[17] 42 USC § 2000e(b); 42 USC 12111(5)(A). *See also* Owens v. Southern Dev. Council, Inc., 59 F. Supp. 2d 1210 (M.D. Ala. 1999) (concluding that employer and employee are defined similarly under title VII of the Civil Rights Act of 1964 and the ADA and that the payroll method applies to both).

[18] 29 USC § 630(b).

[19] 29 USC § 2611(4)(A)(i).

[20] 29 CFR § 1630.2(i). *Major life activities* are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See also* Amadio v. Ford Motor Co., 238 F.3d 919 (7th Cir. 2001) (noting that it is not enough for a plaintiff to show that the employer knew of his or her impairment; plaintiff must also show that the

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employer believed that the impairment substantially limited a major life activity); Redlich v. Albany Law Sch. of Union Univ., 899 F. Supp. 100 (N.D.N.Y. 1995) (granting summary judgment to the law school regarding a professor complaint of inadequate, comparative salary increases; plaintiff had suffered a stroke and lost use of his left leg, arm, and hand, but failed to establish that his disability substantially affected a major life activity).

[21] 29 CFR § 1630.2(k). A *record of impairment* occurs when the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

[22] School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273 (1987) (holding that a teacher with tuberculosis qualified as disabled under § 504—she had a record of impairment—but remanded for the lower court to determine whether she was otherwise qualified at the time of her dismissal). The lower court was instructed to determine whether risks of infection to others precluded the teacher from being otherwise qualified and whether her condition could be reasonably accommodated without an undue burden on the district. Following remand, the teacher was found to be otherwise qualified; she posed little risk of infecting others and was ordered reinstated with back pay.

[23] 29 CFR § 1630.2(l). *See also* Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222 (9th Cir. 2001) (concluding that the plaintiff need not produce direct evidence that the District regarded her as disabled—circumstantial evidence would suffice; plaintiff was a former custodian/groundskeeper who had been forced to resign given her prolonged mobility problems associated with a severe leg injury); Mattice v. Memorial Hosp. of S. Bend, 249 F.3d 682 (7th Cir. 2001) (reversing summary judgment and remanding for further proceedings a case where an anesthesiologist with a panic disorder and major depression was fired following the death of a patient; the court reasoned that the plaintiff may qualify as disabled given either his record of impairment or because his employer treated him as though he had a disability); Ross v. Campbell Soup Co., No. 99-4203, 2001 U.S. App. LEXIS 271 (6th Cir. 2001) (observing that the lower court drew a conclusion as to whether the employer had regarded the plaintiff as a person with a disability when such a decision should have been left to the jury; the company purported that it did not view the former employee as disabled but rather saw him as a malingerer); Merillat v. Michigan State Univ., 523 N.W.2d 802 (Mich. Ct. App. 1994) (determining that the plaintiff supported a *prima facie* case of disability discrimination regarding her termination from the university police department; she had been treated as though she had a disability).

a major life activity, but is discriminatorily treated[24]) or (2) assumed that an actual impairment was substantially limiting when, in fact, the person could perform all of the essential functions of the job, but possibly with the need of accommodation. The ADA also prohibits discrimination against persons who have a family, business, social, or other relationship with a person with a disability.[25] For example, terminating the employment of a parent of a child with a disability for fear of an increase in insurance rates, the loss of insurance, or the loss of production due to the extensive use of leave would violate federal law.

Qualifying as *disabled* represents only half the burden, however, as the plaintiff also must show that he or she is *qualified* in spite of the disability. The applicant or employee must satisfy all requisite skill, experience, education, and other job-related requirements[26] and be able[27] to perform all essential job functions. If no accommodation, or at least no reasonable accommodation, will enable the individual to successfully complete all required job responsibilities that applicant will not qualify for the position. (See further discussion below.)

Substantially Limits

Performance is substantially limited when a person is unable to perform, or is significantly restricted in performing, a major life activity that can be accomplished by the *average person in the gen-*

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[24] For HIV- and AIDS-related cases *see* Bragdon v. Abbott, 524 U.S. 624 (1998) (concluding that an HIV positive dental patient qualified as disabled); Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990) (upholding termination of an HIV positive nurse for refusal to submit his test results); Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (granting a preliminary injunction to a teacher with AIDS who was reassigned to an administrative position; the possibility that the teacher's return to the classroom would produce fear and apprehension in parents and students was not grounds to deny a preliminary injunction); Friedel v. New York State Div. of Human Rights, 632 N.Y.S.2d 520 (App. Div. 1995) (dismissing compliant by HIV positive phlebotomist who was transferred to the billing department due to her violation of policy—on at least three occasions she did not wear gloves on both hands when drawing blood); Racine Unified Sch. Dist. v. Labor & Industry Review Comm'n, 476 N.W.2d 707 (Wis. Ct. App. 1991) (holding that a school policy prohibiting HIV positive staff from coming to work until an appropriate work assignment could be identified violated state law).

[25] 29 CFR § 1630.8.

[26] 42 USC §12111(8); 29 CFR §1630.2(m).

[27] At least one court has even indicated that to be qualified, the individual must be both "willing" and "able" to perform the essential functions of the job. *See* Velazquez-Rivera v. Danzig, 234 F.3d 790 (1st Cir. 2000).

eral population.[28] The nature, severity, duration (or expected duration), and long-term impact of the impairment are considered when determining whether a limitation is substantially limiting.[29] Such a determination requires a case-by-case analysis, often corroborated by expert testimony, as what may be substantially limiting for one person (e.g., tendonitis, Chronic Fatigue Syndrome, carpal tunnel syndrome, asthma, depression, allergy) may not be so for another.[30] Not only will some impairments not limit major life activities (e.g., a hearing-impaired employee who has "average" hearing due to the use of a hearing aid), those that do often restrict the ability to perform only one job rather than a class or broad range of jobs, and therefore not qualify as a disability in regard to "working."[31] The courts will consider the geographic area to which the plaintiff has

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[28] 29 CFR § 1630.2(j)(1).

[29] 29 CFR § 1630.2(j)(2).

[30] *Compare* Williams v. Toyota Motor Mfg., 224 F.3d 840 (6th Cir. 2000) (denying summary judgment as a reasonable jury might determine that plaintiff's tendonitis substantially limited the major life activity of working) *with* Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000) (finding that plaintiff's tendonitis was not substantially limiting for the plaintiff). *See also* Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001 (concluding that Carpal Tunnel Syndrome was not substantially limiting for the plaintiff in her work); Taylor v. Southwestern Bell Tel. Co., 251 F.3d 735 (8th 2001) (determining that plaintiff's depression did not substantially limit any major life activity; she had claimed that her alleged disability was responsible for her accessing customer records for personal purposes); Durley v. APAC, Inc., 236 F.3d 651 (11th Cir. 2000) (concluding that a staff member with Chronic Fatigue Syndrome was not substantially limited in her work); Byrne v. Board of Educ., Sch. Dist. of W. Allis-W. Milwaukee, 979 F.2d 560 (7th Cir. 1992) (agreeing with the lower court that whether discharged teacher's allergy to fungus aspergillus fumigatus substantially limited a major life activity and thereby qualified her as disabled was a question to be answered by the jury); Miller v. AT&T Network Sys., 722 F. Supp. 633 (D. Or. 1989), *aff'd*, 915 F.2d 1404 (9th Cir. 1990) (concluding that asthma was not substantially limiting).

[31] 29 CFR § 1630.2(j)(3)(i). LeBron-Torres v. Whitehall Labs., 251 F.3d 236 (1st Cir. 2001) (holding that plaintiff failed to show that she was substantially limited not only for a broad range of jobs but for the two jobs she had recently performed—i.e., manufacturing operator and hair stylist; the fact that she experiences back pain was insufficient to meet the evidentiary burden); Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998) (finding that the plaintiff's inability to lift as well as the average person did not affect her ability to perform a broad class of jobs); Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047 (5th Cir. 1998) (concluding that the inability to perform a single job did not qualify the plaintiff as disabled; he had been fired for egregious misconduct—verbally abusing and striking a co-worker); Mustafa v. Clark County Sch. Dist., 876 F. Supp. 1177 (D. Nev. 1995) (observing that, for a disability to be substantially limiting, it must foreclose for a particular plaintiff a type of employment and not merely a single job).

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reasonable access, the nature of the job from which the individual was disqualified, and alternative employment options within the region that require similar training, knowledge, ability, or skill.[32] Moreover, courts will consider any mitigating or corrective measures the individual may have taken in assessing the disability and in determining whether it has been substantially limiting.

Mitigating and Corrective Measures

When deciding whether an applicant or employee is disabled, mitigating and corrective measures (both positive and negative—e.g., corrected vision through use of contact lenses; side effects of medication[33]) must be considered. The Supreme Court in *Sutton v. United Airlines*[34] found that myopic twin sisters who had applied for international airline pilot positions were not disabled as defined by the ADA, given that sight for each of the sisters with the aid of corrective lenses (i.e., a visual acuity of 20/20) did not substantially limit the major life activity of being a pilot for either. Moreover, the Court reasoned that the employer did not regard them as having a substantially limiting disability due to the fact that the plaintiffs were restricted only from a single particular job—global airline pilot).

The Court reached a similar conclusion in *Murphy v. United Parcel Service.*[35] In that case, the Court did not have to determine whether the plaintiff (a mechanic with hypertension) qualified as disabled when taking his medication or would qualify if there were negative side effects of the prescription drug. Rather, it only had to determine whether the mechanic was "regarded" as being disabled, given his high blood pressure, and whether he was substantially limited in performing a broad range or class of jobs. In upholding the lower court summary judgment for the employer, the Court reasoned that the plaintiff was terminated for failing to meet Department of Transportation (DOT) blood pressure requirements and not due to the belief that he was disabled (or even because he represented a risk to others). Also, he was not substantially limited in employment, in that many mechanic jobs not requiring the driving of commercial motor vehicles and DOT certification remained open to him, notwithstanding his hypertension.[36]

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[32] 29 C.F.R. §1630.2(j)(3)(ii).

[33] *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471 (1999) (concluding that the use of contact lenses should be considered in determining whether the plaintiffs were disabled); Ozlowski v. Henderson, No. 00-1079, 2001 U.S. App LEXIS 604 (7th Cir., Jan. 17, 2001) (observing that plaintiff's medication, at times, caused him to fall asleep while at work).

[34] Sutton v. United Airlines, 527 U.S. 471 (1999).

[35] Murphy v. United Parcel Serv., 527 U.S. 516 (1999).

Failing to Qualify

A number of persons will fail to qualify as either disabled or qualified due to (1) continued illegal drug and alcohol use, (2) behaviors or characteristics (see list below) that do not qualify as disabilities, (3) the inability to perform essential functions of the job even with reasonable accommodation, or (4) the placement of themselves and/or others at risk if they were to be added to or continued in the work place. Each of these factors is reviewed briefly below.

Alcohol and drugs

Persons who are currently involved in the illegal use of drugs[37] (including the illegal use of prescription drugs), or are unable to perform the duties of the job due to alcohol,[38] will not qualify as disabled. However, a person will qualify as disabled if he or she has successfully completed, or at least is undertaking, a drug rehabilitation program *and* is no longer engaged in illegal drug use.[39] Nev-

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[36] Similarly, the Court in Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) determined that the vision standards required under Federal Motor Carrier Safety Regulations were binding on Albertson's, notwithstanding the exclusion of a sight-impaired truck driver.

[37] 42 USC § 12114(a); 29 CFR § 1630.3(a). *See also* Taub v. Frank, 957 F.2d 8 (1st Cir. 1992) (upholding termination of a drug addict postal worker for possession of heroin for the purpose of distribution).

[38] 29 CFR § 1630.16(b). *See, e.g.*, Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) (upholding termination of assistant coach who was arrested for driving at high rates of speed under the influence of alcohol and nearly striking another vehicle; among his many and varied responsibilities, the coach had been responsible for counseling players with respect to alcohol and drugs and for promoting a positive image); Little v. FBI, 1 F.3d 255 (4th Cir. 1993) (upholding the termination of an FBI special agent who was intoxicated while on duty); Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 506 U.S. 815 (1992) (upholding termination for excessive absenteeism allegedly caused by alcoholism); Dunnigan v. Ambach, 484 N.Y.S.2d 373 (App. Div. 1985) (upholding suspension without pay for one year for an incompetent and insubordinate teacher, notwithstanding teacher's state law claim that her behavior was alcohol-related). *But see* Mackey v. Cleveland State Univ., 837 F. Supp. 1396 (N.D. Ohio 1993) (holding that a coach who was terminated following his arrest for drunk driving stated a claim under the RA); Pierce v. Engle, 726 F. Supp. 1231 (D. Kan. 1989) (holding that the Board could not be held liable under § 504 for nonrenewal of principal for several factors in addition to his status as recovering alcoholic).

[39] 29 CFR § 1630.3(b). *See also* Burka v. New York City Transit Auth., 680 F. Supp. 590 (S.D.N.Y. 1988) (holding that § 504 protects only otherwise-qualified drug abusers who have been or are being rehabilitated).

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ertheless, certain types of employment may be limited given a history of illegal use, notwithstanding its protected status. For example, in *Scott v. Beverly Enterprises—Kansas*,[40] a male nurse had his license restricted due to prior drug use, thereby prohibiting him from administering or having access to narcotic or mood-altering drugs. He, therefore, was unable to administer narcotics or to account for used and unused quantities. He had been fired from several jobs for a range of policy violations and eventually filed suit claiming disability discrimination when he was terminated because of the limitations imposed by his restricted license. The district court granted summary judgment to the employer and held that the plaintiff (1) was not a person with a disability given his current drug use, and (2) was not otherwise qualified because he was unable to perform the essential functions of the job (i.e., administration and regulation of prescription drugs). The nurse had argued that during the month he was fired, he had not tested positive for illegal drugs and was therefore not a current user. The court disagreed and reasoned that the term "current" did not require the employer to catch the employee with heroin syringe in arm or marijuana bong in mouth to support current use.[41] Rather, the employee is considered to be involved in current use if engaged in periodic or ongoing activity that has not permanently ended. Accordingly, given that the plaintiff was engaged in illegal drug use in the months prior to termination (and the months since), the court concluded that he was a current user and not, therefore, protected by federal statute.

Nonqualifying behaviors and characteristics

Persons claiming discrimination due to homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance-use disorders resulting from current illegal drug use do not qualify as disabled.[42] In a related sexual-disorder case, *Motzkin v. Trustees of Boston*

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[40] Scott v. Beverly Enters.-Kansas, 968 F. Supp. 1430 (D.C. Kan. 1997).

[41] *See also* Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997) (upholding summary judgment for the employer where a nurse had been terminated for stealing drugs; she was a "current" user, notwithstanding the fact that she was not caught taking drugs the day of her termination).

[42] 29 CFR § 1630.3(d).

University,[43] a professor sexually harassed several female students, sexually assaulted a colleague, and provided alcohol to minors in violation of both the University's drug and alcohol policy and state criminal code. He admitted to most of the allegations against him and to being unfit to teach, but nevertheless claimed disability discrimination (among other defenses) when terminated following several warnings and an appropriate hearing. He argued that his "unfitness" was not his fault; rather it was due to a "disinhibitory psychological disorder" that limited his control and ability to refrain from engaging in intolerable conduct. Neither counseling nor medication altered his behavior. The plaintiff requested simply that he not be required to teach as a form of reasonable accommodation, but the court refused to order the requested relief and concluded that such accommodation was unnecessary in that the plaintiff's behavior rendered him unqualified for the position.

Failure to perform essential functions

Numerous plaintiffs fail in their respective disability claims because they are unable to perform the essential functions of the job. To be "qualified" for any given position, the person with a disability must meet all legitimate job requirements (e.g., skill and degree requirements, physical expectations, health, experience, certification, licensure)[44] and be able to perform all essential functions, either with accommodation or without.[45] The courts will give significant consideration to an employer's judgment as to job prerequisites and responsibilities. Furthermore, if an applicant were unlicensed, yet had applied for a job requiring licensure, or nondegreed and had applied for a job requiring a specific degree, the person would not be qualified, even if able to prove that the licensure and/or degree had not been acquired in whole or in part due to the person's disability. It is irrelevant why the applicant does not possess the necessary credentials; all that is relevant is that the applicant does not hold them, that such prerequisites are essential to the job, and that each qualifies as a business necessity (discussed below).

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[43] Motzkin v. Trustees of Boston Univ., 938 F. Supp. 983 (D. Mass. 1996). *See also* Winston v. Maine Technical Coll. Sys., 631 A.2d 70 (Me. 1993), *cert. denied*, 511 U.S. 1069 (1994) (affirming summary judgment for the employer in a case where a teacher with a diagnosed sexual behavior disorder was terminated—however, the alleged impairment did not qualify as a disability under the RA, the ADA, or state statute; the plaintiff claimed that his compulsive sexual addiction caused him to sexually harass students, kiss one student allegedly against her will, make suggestive comments to several students, and seek out prostitutes).

[44] Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994) (holding that a lower court's finding that an insulin-using diabetic was not otherwise qualified under the RA to be a school bus driver was not clearly erroneous; the driver was transferred to a position as a van aide). *But see* Mondzelewski v. Pathmark Stores, 162 F.3d 778 (3d. Cir. 1998) (supporting claim by employee that he had been discriminated against when he was shifted to the late evening and weekend schedule when he refused to lift meat, given his diagnosed herniated disc).

[45] 29 CFR 1630.2(m).

Direct threat

In addition to the above, an employee will fail to "qualify" for a particular position if that individual were to pose a direct threat to the health or safety of persons in the workplace.[46] A "direct threat" occurs when there is a *significant risk of substantial harm* to health or safety that cannot be eliminated or reduced by reasonable accommodation. In making such an individualized assessment, the most current medical knowledge or the best available, objective evidence must be used. Applicants or employees can be required to provide medical and psychological records in situations where a substantial risk can be supported.[47] In addition, the duration of the risk, the nature and severity of the potential harm, and the likelihood and imminence of recurrence must be considered in determining "risk."[48] Accordingly, a college's food service director may deny employment to applicants if they are infectious and the risk of transmitting the disease cannot be eliminated through reasonable and foreseeably successful efforts. However, for qualified persons already employed, the employer *at times* must consider reassignment to a vacant position not requiring the handling of food if such a position exists.[49] (See discussion on page 277 regarding transfer and reassignment.)

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[46] 29 CFR § 1630.15(b)(2). *See, e.g.*, Reed v. LePage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001) (finding that a mentally ill bakery worker was fired for insubordination and threatening behavior; moreover, she had never sufficiently requested an accommodation or provided notice of her disability); Palmer v. Circuit Court of Cook County, Illinois, 905 F. Supp. 499 (N.D. Ill. 1995) (concluding that an employee who displayed abusive and threatening conduct toward co-workers failed to be otherwise qualified for the position).

[47] Metzenbaum v. John Carroll Univ., No. 1:96cv1387, 1997 U.S. Dist. LEXIS 17340 (N.D. Ohio Oct. 22, 1997) (finding that the University was entitled to obtain the psychological evaluation records of a campus police officer who was perceived as posing a direct threat; additionally, his discharge was upheld when he failed to provide the requested documentation).

[48] 29 CFR § 1630.2(r).

[49] 29 CFR § 1630.16(e).

In *Mazzarella v. United States Postal Service,*[50] a night custodian "went postal." He had a diagnosed "explosive personality disorder" that resulted in violent and destructive behavior in the workplace (as well as in his private life). The behavior was purportedly associated with stress, but did not follow every stressful situation; plaintiff's violent behavior was unpredictable and extreme. The basis for his termination was the threat he posed and the damage he caused when he admittedly went "out of control" and wrecked the United States Postal Service office. Following his termination, he eventually filed suit. The court reasoned that, as a matter of common sense,[51] an essential function of any job is to refrain from violent behavior that threatens the safety of others in the workplace, even if it has not been specifically articulated. Because no reasonable accommodation could protect employees and property from future unpredictable "fits," the court concluded that the plaintiff posed a potential risk and was not otherwise qualified for continued employment. Moreover, the court held that the plaintiff had been dismissed due to his conduct (and potential for similar future conduct) and not due to his disability.

In a case with a different kind of risk, *Estate of Mauro v. Borgess Medical Center,*[52] a surgical technician who was HIV positive was laid off once it was determined by an internal task force that patients would be at risk during surgery if the infected technician were to participate. In addition to preparing and handling surgical instruments, he, at times, was required to put his hands in an incision to make room for the surgeon to work or to provide visibility. In the process, he would have regular exposure to blood and incur eventual needle pricks (or possibly even cuts). As a career alternative, the medical center had offered the plaintiff a position as cart/instrument coordinator, a position created specifically for him that would not pose a risk to others yet enable him to remain employed in a closely related capacity. The plaintiff refused this proposal and was terminated. In upholding the granting of summary judgment for the employer, the Sixth Circuit held that no reasonable accommodation would eliminate the direct threat the plaintiff posed and that he was not otherwise qualified for his former position.

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[50] Mazzarella v. United States Postal Serv., 849 F. Supp. 89 (D. Mass. 1994). *See also* Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284 (10th Cir. 2000) (finding that a coal mine blaster represented a risk in the workplace given his dizziness problems, migraine headaches, major depression, "several" psychiatric disorders, and anxiety); Sherman v. Runyon, 235 F.3d 406 (8th Cir. 2000) (upholding lower court decision finding no discrimination in termination of a deaf postal worker for aggressively vocalizing, making gestures, and kicking a trash can; his supervisor was shaken by the actions and received counseling to deal with being threatened with violence); Palesch v. Missouri Comm'n on Human Rights, 233 F.3d 560 (8th Cir. 2000) (dismissing ADA and other claims filed by a discharged female worker who had threatened to shoot a co-worker).

[51] This is a nonlegal term and at times is confusing in application. If it (i.e., common sense) were so common, more people would have it. Perhaps a better term would be "uncommon sense" when a thoughtful, responsible, and mature response is sought!

[52] Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398 (6th Cir. 1998). *See also* Robertson v. Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998) (finding a neurologist with Attention-deficit Hyperactivity Disorder to be a direct threat to patients).

Relationship to SSDI

Definitions for *disabled* vary somewhat by statute. A person may meet one statutory definition yet fail to qualify under another, meet neither, or meet both. For example, to qualify for financial assistance under Social Security Disability Insurance (SSDI), a person must have a disability that is so limiting to employment that continuation on the job or any other "substantial gainful work" is not possible (i.e., the person is unable to work). In contrast, to meet the statutory definition for both *disabled* and *qualified* under the ADA and thereby benefit from the protection provided by that law, the employee must be able to meet all essential functions of a job in spite of the disability. Accordingly, qualifying for one would seemingly disqualify the employee for the other.

This issue was addressed by the Supreme Court in *Cleveland v. Policy Management Systems Corporation.*[53] In that case, the Court held that a person may be eligible for ADA protection, notwithstanding qualification for SSDI. The Court noted that although many people will not qualify as disabled simultaneously under both laws, some will, given that the ADA requires the provision of reasonable accommodation. Accordingly, in circumstances where the employee is unable to do the work due to disability, that employee will qualify under SSDI, and yet also may qualify under the ADA if performance would have been possible had the employer provided reasonable accommodation. It is therefore possible, under fairly narrow circumstances, for a plaintiff who is receiving SSDI support to sue his or her employer under title I for failure to accommodate.

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[53] Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999).

The Hiring Process

The hiring process can be costly, time consuming, and complex. Moreover, procedures will vary depending upon the nature of the organization, the position to be filled, provisions within an applicable collective bargaining agreement, and additional practices identified in policy books and other publications. Regardless of the type of organization or the nature of the position, it nevertheless is prudent to follow the procedures described below in an effort to comply with federal law (including disability law) and avoid litigation. This process requires the employer to engage in selected activities at each of five stages of hiring: (1) preemployment, (2) preoffer interview and initial selection, (3) conditional job offer, (4) postoffer interview and examinations, and (5) confirmed job offer.

Preemployment (Essential Functions, Job Descriptions, Advertising, and Recruitment)

The preemployment stage may be the most important of the five in that it provides a foundation for the hiring process and generates data and information used in later stages. This stage includes the identification of essential functions for each position, the preparation of job descriptions, advertising, and recruiting.

Essential functions and job descriptions

Employers should identify the requirements for the position as well as nonessential and essential functions. *Nonessential functions* are those that are ideally performed by the individual hired but can be performed by others, assuming they have to be performed at all. Such shifting of responsibilities at times is possible, but at other times is limited by contracts, bumping rights, and seniority preferences.

In comparison, *essential functions* of a job are those that are fundamental to the position (i.e., the purpose for which the position was created; those functions the person was hired to perform).[54] The person holding the position must be able to perform all essential functions, either unaided or with reasonable accommodation. In determining whether a function is essential, consideration is given to the employer's perspective (perhaps identified in written job descriptions prepared prior to advertising) as to which functions must be performed by the individual hired, whether other employees are available to perform the particular job function, and whether any of the identified responsibilities is so highly specialized that the person was hired for his or her ability to perform that particular task. Moreover, the courts will consider the time spent performing the function, consequences of not requiring the function to be performed, terms of the collective bargaining agreement, and the work experience of past incumbents in the same or similar jobs.[55]

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[54] 29 CFR § 1630.2(n)(1). *See also* Jacobsen v. Tillmann, 17 F. Supp. 2d 1018 (D. Minn. 1998) (concluding that teacher who could not pass a math test as part of a state licensing examination, notwithstanding fourteen attempts and accommodations, was not discriminated against due to disability; the ability to perform and demonstrate basic math skills was held to be an essential requirement to be an elementary teacher).

Once essential functions have been identified, they should be used in the preparation of job descriptions and advertisements as well as a basis for structuring interview questions. Job descriptions should be specific regarding qualifications and expectations. The employer must be able to show the business necessity of each selected criterion, particularly when it is shown to screen out applicants due to their respective disabilities.[56] For example, if punctuality and regular attendance can be shown to be required for a particular job, it is irrelevant that an applicant has a sleeping, anxiety, or emotional disorder that causes him or her to be routinely late or absent from work. Although the employee's absence may in fact be a result of the disorder, such a person simply is not qualified for the position.[57]

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[55] 29 CFR § 1630.2(n)(2)&(3). *See also* Gauthreaux v. Baylor Univ. Med. Ctr., 879 F. Supp. 634 (N.D. Tex. 1994) (denying summary judgment in a case where a former nurse, who underwent a successful spinal fusion which left moderate restrictions upon her ability to do repeated stooping or heavy lifting and who had myasthenia gravis, was terminated—summary judgment was not appropriate as it had not been determined whether lifting was essential to the job; following surgery she injured her back while lifting an obese geriatric psychiatric patient and while restraining a second patient who was combative).

[56] 29 CFR § 1630.10.

[57] Tyndall v. National Educ. Ctrs., 31 F.3d 209 (4th Cir. 1994) (holding that a former business college instructor who suffered from lupus erythematosus, an autoimmune system disorder, was not qualified for the position, and her employer did not unlawfully discriminate against her based on her association with her disabled son; an employee who cannot meet attendance requirements of the job cannot be considered qualified); Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) (holding that coming to work regularly was an essential function); Walders v. Garrett, 765 F. Supp. 303 (E.D. Va. 1991) (concluding that reasonably regular and predictable attendance is necessary for many jobs), *aff'd*, 956 F.2d 1163 (4th Cir. 1992); Santiago v. Temple Univ., 739 F. Supp. 974 (E.D. Pa. 1990), *aff'd without published opinion*, 928 F.2d 396 (3d Cir. 1991) (holding that termination of an x-ray attendant for excessive lateness was not in violation of § 504 or the Due Process Clause, among others; attendance was found to be a fundamental requirement for the job); Law v. United States Postal Serv., 852 F.2d 1278 (Fed. Cir. 1988) (holding that

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Early in the employment process, essential functions also may be used as a basis to select new or alternative accommodations. Later, essential functions may prove helpful in assessing eligibility for merit or promotion, or in deciding whether an employee should be terminated, nonrenewed, or transferred.

Advertising and recruiting

Selecting the method to advertise and recruit for a position in large part is dependent on the position being filled and the available budget. At the university level, the search for a night custodian, clerk, or secretary will be significantly different than that for a professor, provost, or president. Given the limitations of space, however, only one example will be provided—the hiring of the Director of Student Disability Services.

The process to hire a college administrator typically involves numerous people and units of the college, requires extensive advertisement, and necessitates the allocation of dollars (often thousands of dollars) and human resources. Search committees typically range in size from three to seven, with efforts made to ensure diversity and representation of stakeholders (e.g., peer practitioners, faculty, staff, students, alumni). One of the first tasks of the committee is to prepare a job description (assuming one does not already exist) that ultimately will be approved by affirmative action and the college's administration (often the provost within larger universities). The committee should be specific as to job expectations, essential functions, and requirements for initial employment (e.g., degree level, experience). (See Example 10-1.) Moreover, the committee needs to agree on the procedures to be followed (e.g., where to advertise; when to advertise and interview; criteria to be used in screening out applicants).

Although neither title I nor section 504 requires affirmative action in hiring for persons with disabilities, it is not uncommon for colleges to target underrepresented populations (sometimes including persons with disabilities, although typically reserved for underrepresentation due to race or gender) in their recruitment plan.

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attendance is a minimum function of any job); School Dist. of Philadelphia v. Friedman, 507 A.2d 882 (Pa. Commw. Ct. 1986) (concluding that former employee's alleged personality disorder, even if established as a disability, did not require his employer to accommodate his chronic lateness). *But see In re* Dunlap, 604 A.2d 945 (N.H. 1991) (holding that a teacher with chronic asthma who was nonrenewed due to numerous absences was entitled to reinstatement under state law).

Example 10-1
Job Description

Title:
Director, Student Disability Services

General Job Objective:
Student Disability Services (SDS) is a small administrative unit on this campus (three full-time counselors and one secretary; one graduate assistant for twenty hours per week; one undergraduate work-study student for ten hours per week). In addition to coordinating all activities for which the office is responsible, the Director at times also will need to serve as a direct service provider. In fulfillment of this dual role, the Director will either provide, or supervise and coordinate, the documentation review of all clients; the selection of accommodations, modifications, and assistive technologies for qualifying students; the advisement and counseling provided for qualifying students as to majors and courses, as well as other personal needs; and the coordination of campus activities to ensure that accommodations are provided properly and timely.

Reports to:
Vice-president for Student Affairs and Enrollment Management

Qualifications:
The successful candidate will have a minimum of a master's degree in Higher Education Administration and Student Personnel, Rehabilitation Counseling, Counseling, Counseling Psychology, or Special Education (Ph.D. preferred but not required) *and* a minimum of four years in a subordinate role within an SDS or similar unit (prior director experience preferred but not required).

Essential Functions & Brief Rationale:

General

(1) work eight hours a day, Monday through Friday, from 8:00 a.m. to 5:00 p.m. with a one-hour lunch break (the office is open during these hours);

(2) work fifty of fifty-two weeks per year—two weeks paid vacation (must be taken during semester break (December 20-January 20) or summer intersession (May 15-30) (these dates represent the times when client demand is lowest);

(3) maintain a neat, appropriate, and professional appearance (the University is a professional setting and the person selected to fill this position is in a leadership role);

(4) knowledgeable of all related federal and state disability laws (critical to maintaining compliance);

Technical Skills and Training

(5) assess technical psychological and medical reports (needed to determine whether a student is disabled, whether the student qualifies for accommodation, and whether a requested accommodation or modification is justified);

(6) document student progress by maintaining and submitting thorough and appropriate records and reports (necessary for office efficiency, the delivery of services, and compliance);

(7) effectively participate as a team leader/member in eligibility reviews (necessary to ensure efficient office operations and consistent decisions);

(8) engage in professional development activities in order to keep abreast of changes within the field (helps ensure the delivery of appropriate and effective accommodations);

(9) ability to apply knowledge of current research and theory (helps ensure the delivery of appropriate and effective accommodations);

Organizational Skills and Knowledge

(10) ensure that test sites are quiet and distraction free (needed to ensure the accommodation is effective);

(11) ensure that technologies work properly and are effective (needed to ensure the accommodation is effective);

(12) interact effectively with other administrators and faculty (needed to ensure that accommodations are provided properly and timely);

(13) prepare materials and provide information during scheduled open house and Disability Awareness Week activities (needed to provided notice to students that the University is in compliance with federal and state law and is making accommodations and modifications available to qualifying students);

(14) knowledgeable of university operations and how services are acquired and activities delivered (necessary to ensure efficiency);

Interpersonal and Communication Skills

(15) ability to establish and maintain effective, courteous, professional, and positive relationships with student-clients, peers, and administrators (needed for the efficient operation of the office); and

(16) high level skills in oral and written communication (needed for making numerous required oral presentations on and off campus and for the preparation of a student handbook and other necessary written materials).

Compensation

The person filling this position will receive an initial salary of $56,000; two weeks paid vacation; free tuition for self, spouse, and dependents; and health, dental, and eye insurance.

Evaluation

Annual evaluations are performed for all university administrators; forms are completed by all subordinates and then submitted to the Vice President for Student Affairs and Enrollment Management. A five-year evaluation also is required that includes peer (other administrators with whom the Director works) evaluation in addition to those provided by subordinates.

This generally results in efforts to disseminate job information to potential applicants through advertising in hard-copy publications (e.g., in the *Chronicle of Higher Education*) and in electronic sources (e.g., *The Black Collegian*), and through sending personal communications to specific persons who have been identified during the process—perhaps by referrals, nominations, or listings in national directories (e.g., *Minority & Women Doctoral Directory*). Additionally, it is common to identify college programs that graduate persons with both the personal characteristics and academic credentials being sought so that program coordinators and other faculty might bring the job notification to the attention of potentially interested and promising students. This latter process can be particularly effective in the recruitment of persons with disabilities when certain colleges are targeted (e.g., Gallaudet—a four-year liberal arts university for students who are deaf or hard of hearing).

Even if persons with disabilities are not specifically targeted for recruitment, such persons will have access to marketing information through routine methods (e.g., *Chronicle*, internet resources) and may elect to apply. Once in the pool, they will be either selected or screened out.

Preoffer Interview and Initial Selection

Once applications are received, the committee typically conducts an initial screening-out. This task is fairly easy in comparison to later selection efforts and requires the elimination of those applicants who clearly do not possess at least minimum qualifications. This group can be larger than perhaps expected as numerous applicants seem to "shotgun" their job search by applying for every conceivable position they feel they can perform, notwithstanding experience and credentials.

Following this initial screening, the number of candidates who possess at least minimum qualifications will then need to be reduced (assuming one or more applicants is at least minimally qualified) so that a manageable number of qualified candidates remains. Unlike the initial screening, the identification of those who are comparatively better qualified is difficult but can be accomplished through the use of both objective (e.g., number of years of high level administrative experience; highest degree received) and subjective measures (e.g., quality of interpersonal skills; perceived ability to work as a team member). As a rule, courts will provide great deference to employers in identifying job requirements and in determining which candidates best meet those requirements.

In addition to paper credentials, employees also may require perspective employees at this time to submit to nonmedical examinations or tests, including personality tests, typing skills tests, tests to measure honesty (e.g., IFIB Personality Test), and computer skills tests. Also, physical agility and ability tests that are consistent with business necessity are not considered medical examinations and therefore may be given at any point in the application or employment process if required of all applicants.[58] Only those employees who meet the employer's legitimate physical criteria for the job will be qualified to receive confirmed offers of employment and to begin work.[59]

Similarly, the ADA does not consider a drug test to be a medical test, although federal disability law neither encourages, prohibits, nor authorizes the use of drug tests.[60] However, the ADA does permit employers to have reasonable policies or procedures (including those related to drug testing) to ensure that an individual is no longer engaging in the illegal use of drugs[61] and to require all employees to comply with the Drug Free Workplace Act of 1988.[62]

Nonetheless, it is important to note that the use of drug tests without individualized suspicion of drug use may violate the Fourth Amendment (prohibiting unreasonable searches and seizures) if required in the public sector. Without individualized suspicion, public employees only in occupations involving safety, security, or the handling of drugs can be randomly drug tested (e.g., bus drivers, pilots, security officers, doctors, nurses). Since the Fourth Amendment does not apply to private employers, random drug searches within the private sector would be permitted unless restricted by state law or collective bargaining agreement.

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[58] As a general rule, the employer will not be liable where an applicant voluntarily submits to a test requiring exertion and is injured or dies as a result. *See, e.g.*, Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994) (finding no liability for compensatory or punitive damages under the ADA or Civil Rights Act of 1991 for the death of an interviewee who collapsed while performing a physical agility test during the interview process for a security officer's position—the applicant was overweight and was asked to run 1.5 miles; the cause of death was atherosclerotic cardiovascular disease).

[59] 29 CFR § 1630.14(b).

[60] 29 CFR § 1630.16(c)(1).

[61] 29 CFR § 1630.3(c).

[62] 29 CFR § 1630.16(b)(3). *See also* Drug Free Workplace Act of 1988, 41 USC § 701 (requiring the publishing of a statement notifying employees that drug-related activities are prohibited in the workplace; establishing a drug-free awareness program, and requiring employees to abide by the provisions of a drug-free workplace).

In an effort to further reduce the applicant field, search committees often either subjectively rank order the remaining candidates or limit the field through the use of quantified evaluation forms that correspond to the selection criteria. Other times, committee members simply discuss the qualifications of candidates to see if a consensus exists regarding the identification of the best-qualified applicants who are to become finalists for the position. Obviously, there is no one best way to narrow the field. But, if the procedures are fair and do not discriminate in impermissible ways, they will be upheld if challenged in court.

Once finalists have been identified, it is common to conduct personal interviews either by telephone, face-to-face, or both. These interviews can be conducted by single committee members, a subgroup of the committee, or the committee as a whole. Until this time, and unless the applicant was personally or professionally known by a committee member, it is unlikely that an applicant's disability status was known by the committee. Even then, phone interviews still will not reveal vision, mobility, dexterity, and other impairments that may have become visually apparent had the interview been conducted face-to-face. If a person's disability is self-identified or apparent, employers still may not make inquiries (to the applicant or to persons who know the applicant) about the existence, nature, or extent of an applicant's disability, the ability to perform major life activities, workers' compensation history, or current use of legal drugs (unless the applicant tested positive for use of illegal drugs, and then only to the extent necessary to ensure accurate testing). However, if an applicant requests an accommodation for the interview process, and the need is not obvious, the employer may request limited documentation to support the request.

Notwithstanding the above, the employer may ask questions regarding the applicant's ability to perform job-related functions and inquire as to how he or she would perform certain tasks.[63] Also, questions regarding nonmedical qualifications and skills (e.g., work history, licensure, certification, degrees, arrest and conviction record) are permitted at this time. Employers even may ask about impairments (e.g., broken leg), but not disabilities, current and prior use of illegal drugs (as long as questions reflect prior use rather than quantity used or prior addiction—a covered disability), and drinking habits or preferences (unless likely to elicit information about alcoholism—e.g., an inquiry as to whether the applicant would like wine at dinner is permissible), but not in regard to the quantity consumed.

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[63] 29 CFR § 1630.14(a).

Interestingly, an employer may ask employees to self-identify as individuals with disabilities when included within affirmative action efforts (permitted but not required under section 504 and title I). When self-identification is solicited, employers should make clear to prospective employees that submission of information is voluntary and if provided will be kept confidential and separate from the application. Also, applicants should be informed that failure to self-identify will not adversely affect their application.

During the screening-out process, an employer may not use qualification standards, employment tests, or other selection criteria that disqualify individuals with disabilities unless shown to be job-related and consistent with business necessity. Any tests that are used must accurately reflect the skills, aptitude, or other factors the tests purport to measure, rather than the impaired sensory, manual, or speaking skills of the employee or applicant, unless those were the skills being measured.[64]

Once all the data are in, the committee then is responsible for making the final selection. When this task has been accomplished, a conditional job offer may be tendered. In the selection of the "best" qualified candidate, it is important to note that federal law requires nondiscrimination[65]; it does not require employers to hire unqualified applicants, those who are less qualified, or even those who are equally qualified. Persons not capable of performing each of the "essential functions" and those who do not possess minimum qualifications can be screened out at any time during the process, even if they represent a population that is underrepresented or the target of affirmative action.[66]

Conditional Job Offer

Culmination of the screening-out process should result in the selection of the person perceived to be the best qualified (assuming that at least one is qualified). Often committees within universities only recommend to administrators (such as deans, vice presidents for student affairs, provosts) who they prefer to hire, with the actual decision made by persons higher in the hierarchy. Regardless, authorized persons within the organization should make a selection and communicate that decision to the committee and to the successful applicant. At this time, a conditional job offer can be extended, indicating that the applicant has been selected for the job, pending the outcome of postoffer interviews and examinations to ensure that the selected applicant is indeed qualified, despite having a disability. The conditional job offer can be waived and a final job offer can be proffered, if the employer so chooses. If not, the applicant then proceeds to the next stage—postoffer interview and examinations.

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[64] 42 U.S.C. § 12112(b)(6)&(7).

[65] 42 U.S.C. § 12112(a) (mandating that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"). Furthermore, even religious organizations may not discriminate based on disability, although they may prefer persons within their faith for many positions—*see* 29 CFR § 1630.16(a).

[66] 29 CFR § 1630.9(b).

Postoffer Interview and Examinations

If necessary, a postoffer interview may be held and the applicant now may be required to submit to medical and other examinations prior to a final job offer and the signing of a contract, but only if all employees are required to submit to such additional requirements. Specific disability-related questions (questions that are likely to elicit information about a disability) may now be asked. However, if a conditional offer is rescinded because test results indicate that an applicant fails to meet mandatory job requirements, one of two things must be proven: (1) that the criterion does not screen out, or tend to screen out, persons with disabilities, *or* (2) that the examination is in fact job-related and consistent with business necessity.[67] Employers also may inquire at this time as to the applicant's workers' compensation history, previous sick leave use, and general physical and mental health.

Confirmed Job Offer

Once the applicant who received a conditional job offer has completed the required medical examinations (if any), interviews, and the like, a final job offer may and should be extended, unless it was discovered through the additional screening procedures that the applicant is not otherwise qualified for the position. The individual cannot be rejected because a physical or mental impairment that substantially limits a major life activity (possibly working) is discovered, or the individual will need accommodation to perform essential job functions.

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[67] 29 CFR §1630.14(b) App.

Reasonable Accommodation

Where qualifying employees have properly documented their respective disabilities it may be necessary for employers to provide such employees with reasonable accommodations.[68] In an employment context, *reasonable accommodation* refers to modifications or adjustments to a job that are necessary to enable an employee with a disability to perform essential functions of the position *or* to enjoy benefits and privileges of employment equal to those enjoyed by persons without disabilities.[69] Dependent upon the aggregate of circumstances, reasonable accommodation *may*, at times, include practices such as making facilities accessible and usable; restructuring jobs and work schedules; reassigning existing employees with disabilities to vacant positions;[70] acquiring or modifying equipment; making adjustments or modifications to examinations, training materials, and policies; or providing readers or interpreters.[71] The redistribution of marginal (nonessential) functions among several jobs so that the qualified individual with a disability can fill a position also may qualify as a reasonable accommodation; however, an employer is not required to reallocate essential functions.

To determine whether an accommodation is both appropriate and reasonable, it is necessary for the employer and employee with a disability to engage in an informal, interactive process to discuss how the employee will perform essential functions.[72] Accommodation preferences of the employee should be considered, although the employer ultimately may select among effective alternatives (e.g., an employer may select a less-expensive, effective accommodation or one that is more easily provided than the one preferred by the employee). The individual with a disability is not required to accept the accommodation, aid, service, opportunity, or benefit offered by the employer. Failure to do so can have repercussions, however. If the individual rejects such an offer and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified and can be removed.[73]

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[68] Vollmert v. Wisconsin Dep't of Transp., 197 F.3d 293 (7th Cir. 1999) (finding that the employer failed to accommodate a staff member with dyslexia and learning disabilities when it transferred her to a position with fewer opportunities for promotion; such a transfer was inappropriate as reasonable accommodations had not been provided for the previous position).

[69] 29 CFR § 1630.2(o)(1)(ii)&(iii).

[70] Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999) (*en banc*) (concluding that the ADA requires an employer to reassign a disabled employee to a vacant position, if the employee is unable to perform the essential functions of the current position but is able to perform those of the new position); Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*) (concluding that a hospital must reassign an employee to a vacant position when unable to perform the essential functions of the current job). *But see* Coffman v. West Virginia Bd. of Regents, 386 S.E.2d 1 (W. Va. 1988) (holding that state law did not require the employer to reassign a custodian with a back injury to a job she could perform; reasonable accommodations were designed as attempts to enable employees with disabilities to remain in the positions for which they were hired).

[71] 42 U.S.C. § 12111(9); 29 CFR § 1630.2(o)(2).

[72] 29 CFR § 1630.2(o)(3).

Details about an employee's disability should be shared only on a need-to-know basis (e.g., government officials investigating compliance). Accordingly, supervisors and managers may be informed about restrictions on work duties and the need for necessary accommodations, but generally do not need information about the disability *per se*. However, persons responsible for first aid and safety, under certain conditions, may need to know about the specifics of the disability, required medications, and necessary emergency care.[74] Most requested accommodations cost between $0 and $1,000 and are somewhat routinely provided; others have cost (or were projected to cost) in excess of $10,000 and were either reluctantly provided or challenged as resulting in undue hardship.

Undue Hardship

Given the nature and extent of some disabilities, there are situations when no type of accommodation will enable an applicant to fulfill the requirements of the job (e.g., a person with severe vision impairment wanting to be a bus driver).[75] Other times, the accommodations are "possible," but are financially or organizationally impractical and would result in hardship on the employer.[76] Whether undue hardship results from a specific form of requested accommodation is determined by the courts after a review of the size of the program and its budget; the number of employees; the type of facilities and operation; the type and cost of accommodation (taking into consideration the availability of tax credits and deductions, and/or outside funding); the impact of the accommodation upon the operation of the facility, including the effect on other employees to perform their duties; and the impact on the employer's ability to conduct business.[77] Because there is no fixed formula for related calculations, courts have ranged markedly in identifying what they consider reasonable. The accommodation may be as simple as assignment to an office with windows or, in narrowly tailored situations, as costly as structural renovations, the installation of air purification systems, or the hiring of aides.[78]

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[73] 29 CFR § 1630.9(d).

[74] 42 U.S.C. § 12112(d)(3)(B); 29 CFR § 1630.14(b)(1).

[75] Deas v. River W., 152 F.3d 471 (5th Cir. 1998) (finding that the employer appropriately determined that the plaintiff could not be accommodated in her current employment as an addiction technician due to her petit mal or "absence" seizures; she would become verbally unresponsive and seemingly lose awareness of her surroundings).

[76] 29 CFR § 1630.15(d); 29 CFR § 1630.9(a)—It is unlawful for a covered entity not to make reasonable accommodation to the *known physical or mental limitations* of an otherwise-qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. *See, e.g.*, Merrell v. ICEE-USA Corp., No. 99-4173, 2000 U.S. App. LEXIS 33327 (10th Cir. 2000) (noting that the only accommodation that would allow a man who supplied and serviced carbonated beverage machines to meet the essential functions of his

Terms and Conditions of Employment

Section 504 and title I, in effect, require nondiscrimination regarding virtually all aspects of the employment process and all terms and conditions of employment. A few of the more commonly litigated areas (i.e., compensation, leaves of absence, transfer and reassignment, and hostile environment) are discussed below.

Compensation

Federal disability law is violated when an employer compensates a person with a disability less well than persons without disabilities, but only if such differentiation is due to disability.[79] Pay differences may be based on quantity or quality of work performed, seniority, education, job responsibilities, and the like. Accordingly, a piece-work assembly line worker who has manual manipulation

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job would be for the employer to hire a second individual to accompany him and to perform all of his heavy lifting; such an accommodation was found to create an undue burden on the employer).

[77] 42 U.S.C. § 12111(10); 29 CFR § 1630.2(p).

[78] *See, e.g.*, Kent State Univ. v. Ohio Civil Rights Comm'n, 581 N.E.2d 1135 (Ohio Ct. App. 1989) (finding that the University failed to properly accommodate a purchasing agent with a respiratory disability); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131 (2d Cir. 1995) (vacating summary judgment in favor of the District in a case where a teacher claimed disability discrimination in her denial of tenure; fact questions remained whether accommodation of a teacher aide would render the teacher otherwise qualified).

[79] Anderson v. United Airlines, No. 95-1458, 1996 U.S. Dist. LEXIS 3555 (E.D. La., March 20, 1996) (concluding that employee was not denied overtime work due to his disability; he conceded that he was not capable of working overtime and that he was simply seeking compensation for lost earnings potential).

skills that are slower than his or her counterparts might receive a justifiably lower salary given the lower level of productivity. Or, a professor with a severe vision impairment or learning disability may take more time to complete research and to prepare the results for publication, thereby producing less in a career than his or her nondisabled peers providing the same level of effort and commitment. Such a person must be held to the same standards as others, however, or the process would be found arbitrary, if not discriminatory. If a college were to adjust for factors associated with disability, how much should the adjustment be? What disabilities should receive adjustments and which should not? If different (and lower) standards are used for faculty with some selected disabilities, what about female (and male) employees who are primary care givers for small children or aging parents? What about faculty who must work overloads or second jobs to meet the financial needs of those who are dependent? What about those with excessive demands at home due to the healthcare of others, drug or alcohol addiction, etc.? Clearly, such adjustments not only would be viewed as discriminatory by many nonrecipients of the adjustments, but also would be found unmanageable in practice and in the courts.

In addition to salary or wages received from their employers, some persons who become disabled because of work-place injuries also have collected compensation under their respective state's workers' compensation statute. Because employees with disabilities often are the recipients of revenues from these funds, a brief summary of workers' compensation laws is provided in this section.

Workers' compensation

All states today have workers' compensation laws. They differ by state, yet have overall general similarities. Such laws are designed to protect employees[80] and their families from the risks of accidental injury, death, or occupational disease[81] resulting from employment. Ideally, workers' compensation laws will reduce or eliminate fees associated with litigation and tort claims; encourage maximum employer interest in safety and rehabilitation; and promote study of the causes of accidents (rather than concealment of fault), thereby reducing preventable accidents. Most states require covered employers to carry workers' compensation coverage through private insurance companies (similar to medical coverage), or to make payments into a state fund (generally at a rate between five and ten cents per $100 of payroll). In such instances, employer rates vary by "classification"—the greater the risk associated with employment, the higher the rate.

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[80] In Ohio, the definition of an *employee* includes every person in the service of the state, county, municipal corporation, township, school district, etc. (OCR § 4123.01(A)(1)(a)); also includes every person in the service of any other person, firm, or private corporation that employs one or more persons in the same business under any contract of hire (whether the contract is oral or written, express or implied) and includes aliens, minors, household workers, or casual workers who earn $160 or more in any three-month period and who are required to pay premiums into the state insurance fund (OCR § 4123.01(A)(1)(b)). An "employee" does not include a duly ordained minister of a church or an officer of a family farm corporation unless the employer elects to include them as employees. Also, independent contractors generally are not employees but may qualify for protection under OCR § 4123.01(A)(1)(c) where ten of twenty criteria are met.

Workers' compensation laws create strict liability for employers when their employees are accidentally injured; liability exists regardless of negligence or fault on the part of the employer or employee, provided that the injury[82] was accidental *and* arose out of, and in the course of, employment. However, employers that comply with workers' compensation laws are not liable at common law for work-related injury, except possibly where the injury resulted from an employer's intentional tort. Moreover, employees of a covered employer typically are immune from negligence suits filed by injured co-workers, but also may be sued for intentional torts. In this regard, the definition of *intentional tort* encompasses two levels of intent: *direct intent* (uncommon) where the employer does something that causes the exact result intended and desired; and *substantially certain intent* (common) where the employer does something believed to be substantially certain to cause a particular result even if that result is not desired.

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[81] *Occupational disease* is a disease contracted in the course of employment, where the nature of the employment is such that it creates a risk of contracting the disease to a greater degree than the public in general (OCR § 4123.01(F)). Examples of occupational diseases are lead, mercury, and carbon dioxide poisoning; asbestosis; tenosynovitis; berylliosis; silicosis; coal miners' pneumoconiosis; and cardiovascular, pulmonary, or respiratory diseases. However, no compensation is awarded when an employee willfully and falsely represented himself or herself as not having previously suffered from a disease that he or she now claims to have contracted in the workplace (OCR § 4123.70).

[82] The State of Ohio excludes the following from the definition of injury: (1) psychiatric conditions, except where they arise from a compensable injury or disease (OCR § 4123.01(C)(1)); (2) injuries or conditions caused primarily by the natural deterioration of tissue, an organ, or part of the body (OCR § 4123.01(C)(2)); (3) injuries or disabilities incurred as a result of an employer-sponsored fitness or recreational activity, assuming the employee signs a waiver prior to engaging in the activity (OCR § 4123.01(C)(3)); (4) injuries or diseases caused by the employee's intoxication or being under the influence of a controlled substance not prescribed by a physician (OCR § 4123.54(B)); (5) purposely self-inflicted injuries (OCR § 4123.54(A)); injuries sustained by the person who started a fight; (6) injuries sustained by a worker committing a crime; and (7) injuries sustained while not on the job or while on the job but the conduct resulting in the injury was in violation of company policy.

Once the employee has documented that an injury was work related, compensation is provided. The amount received is determined by the type of injury, the extent the injury limits working (temporary, partial disability as compared to permanent, total disability), state statute, and state funding.

Leaves of Absence

Employees often have a range of "leave" opportunities, including sick, medical, religious, and personal, as well as leave associated with the Family Medical Leave Act.[83] Within larger organizations the extent of leave and compensation (if any) will be specified in a personnel manual, handbook, collective bargaining agreement, contract, or accommodations agreement with the employee. Unless agreed to as an accommodation, all similarly classified employees should be treated the same in regard to leave policies. In practice, some employees will request every possible day each year for each form of leave while a few will work entire years or even careers without taking off a single day. At times, employees are replaced with temporary "substitutes" and the work continues in their absence; other times the work "waits" for the employee to return. In the first instance (the use of substitutes), costs are increased and efficiency in most instances is decreased while in the second (waiting work) efficiency and timeliness are clearly compromised.

By the nature of some disabilities, afflicted persons will require time off from work for physician appointments, therapy, rehabilitation, or rest. As a result, an employee may exhaust all leave permitted by an employer. Federal law does not necessarily require an employer to provide employees with disabilities paid or unpaid leave beyond that provided to others. In some instances, hardship would result if the employer were required to accommodate excessive absences while the employee likely would be found unqualified for the position.[84]

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[83] Family Medical Leave Act, 29 USC § 2601 *et seq.*

[84] EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943 (7th Cir. 2001) (holding that disability law does not require an employer to provide an employee with unlimited sick leave); Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8th Cir. 2001) (concluding that federal law did not require the employer to

In addition to the leave provisions identified in policy or bargaining agreement are those provided under the Family Medical Leave Act (FMLA). The leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers under the ADA. But, because the FMLA has provisions that are available to employees with disabilities (among others) and to employees with children, spouses, or parents with severe health care needs, a brief discussion of FMLA's requirements is provided below.

The Family Medical Leave Act of 1993 (FMLA)

The FMLA allows eligible employees (both males and females on a equal basis) of a covered employer to take job-protected unpaid leave, or to substitute appropriate paid leave (where it is available and has been earned), for up to a total of twelve work weeks in any twelve-month period. However, when an eligible husband and wife work for the same employer they may be limited to a combined total of twelve weeks if the leave is attributable to the birth or placement of a child.[85] The leave is available to persons because of (1) the birth and care for a newborn child; (2) the placement of a child with the employee for adoption or foster care;[86] (3) the need to care for a close family member;[87] or (4) the employee's own serious health condition, assuming that the employee's condition renders him or her unable to perform the essential functions of the job (as stipulated by a qualified health care provider).[88]

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reassign existing workers to compensate for plaintiff's unexpected absences and that dependable attendance was required for his job as a receiving clerk, notwithstanding the fact that his absence was cause by Irritable Bowel Syndrome).

[85] 29 USC § 2612(f).

[86] An employee's entitlement to leave for a birth or a placement for adoption or foster care expires at the end of the twelve-month period beginning on the date of birth or placement, unless state law allows (or the employer permits) leave to be taken for a longer period of time. Note that leave is available to the new parents and not to the person(s) giving a child up for foster care or adoption. *See* 29 USC § 2612(a)(2).

[87] The term *close family member* is limited to the employee's child (typically a child under the age of eighteen, unless disabled and unable to care for himself or herself—*see* 29 USC § 2611(12)), spouse (including common law spouses where state law recognizes such unions), or parent (does not include parent-in-laws or grandparents) with a serious health condition. Same-sex marriages are not recognized unless legal under state law or the employer voluntarily agrees to recognize such unions.

[88] 29 USC § 2612(a)(1).

A *covered employer* is defined as any employer with fifty or more employees for each working day during twenty or more workweeks in the current or preceding calendar year, as well as all public agencies regardless the number of employees (e.g., United States government and its agencies, all state governments and political subdivisions, any interstate governmental agency).[89] Public, as well as private, elementary and secondary schools are covered employers without regard to the number of employees. And finally, separate entities (e.g., subdivisions of a large company) are considered part of a covered employer if they meet the *integrated employer test*. Factors considered under this test are common management, interrelation between operations, centralized control of labor relations, and degree of common ownership.[90]

To qualify for leave, the person making application should have worked for the employer for at least twelve months (the twelve months do not have to be consecutive) in which he or she will have worked for at least 1,250 hours preceding the commencement of leave (teachers and professors are assumed to have worked the necessary 1,250 hours if they have been employed twelve or more months). Independent contractors generally do not qualify as employees. Moreover, persons who are subject to being rightfully terminated or laid off are not protected simply because they qualify and elect to take FMLA leave.[91] The employer has the right to thirty days advance notice from the employee where practicable and may require the employee to submit certification from a health care provider to show that the leave is justified due to the serious health condition of the employee or an immediate family member.[92] If the employer has any reason to doubt the validity of a medical certification, it may require the employee to obtain a second opinion at the employer's expense.[93] If the opinions of the employee's and employer's health care professional differ, the employer may require the employee, once again at employer's expense, to obtain certification from a third health care provider, whose opinion is final and binding.[94] The employee also can be required to present a certification of fitness to return to work when the absence was caused by the employee's own serious health condition. The justification for such a requirement must be based on job-related criteria and be narrowly targeted only with regard to the particular health condition that caused the employee's need for FMLA leave. The employee is responsible for paying the costs associated with a return-to-work certification. If the employee fails to provide the requested certification, the employer may deny reinstatement until such time as the necessary documentation is submitted. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time the FMLA leave is concluded, the employee may be terminated.

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[89] 29 USC § 2611(4).

[90] 29 CFR § 825.104(c)(2).

[91] Santos v. Knitgoods Workers' Union, 252 F.3d 175 (2d Cir. 2001) (concluding that the plaintiff was terminated for reasons other than disability or retaliation and that she was not entitled to FMLA leave following her termination date).

[92] 29 USC § 2613(d).

[93] 29 USC § 2613(c)(1).

[94] 29 USC § 2613(d).

For a condition to quality as *serious*, it must require inpatient care or continuing treatment by a health care provider and the period of incapacity must be for at least three days or be necessary to receive multiple treatments by a health care provider (e.g., chemotherapy, radiation). Cosmetic surgery (unless inpatient hospital care is required) the common cold, flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), and routine dental or orthodontia work will not qualify the employee for FMLA leave.

An employee is *needed to care for* a family member with a serious health condition when the family member is unable to care for his or her own basic medical, hygienic, safety, or nutritional needs, or is unable to transport himself or herself to the doctor.[95] The term also includes providing psychological comfort that would be beneficial to the family member who is receiving inpatient or home care. If receiving FMLA leave for this purpose, an employee is required to actually attend to the needs of the family member and not simply use the family member's health condition as a fraudulent basis for leave.

In certain cases where the employee is able to perform the essential functions of the job,[96] that individual may take FMLA leave on an intermittent basis rather than all at once, or may work a part-time schedule. Intermittent leave is taken in blocks of time and is based upon a single qualifying reason. In comparison, a reduced leave schedule is one where an employee's usual number of working hours per workweek or hours per workday is reduced. Where the leave is attributable to the birth or placement of a child, permission from the employer is required; such permission is not necessary where the leave is attributable to a serious health condition. Furthermore, the employer may require the employee to transfer temporarily to an alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. The alternative position must have equal pay and benefits and may not be required in order to discourage the employee from taking leave or to create hardship for the employee. For example, a white-collar employee may not be assigned to perform laborer's work and a person working day shift may not be assigned to graveyard duties. When the employee taking intermittent or reduced leave is able to return to full-time work, he or she must be returned to the same or equivalent job the employee had when the leave commenced. If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the twelve weeks of leave to which the employee is entitled. For example, if an employee who normally works five days per week takes off one day, the employee would only use one-fifth of a week of FMLA leave.

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[95] 29 CFR § 825.116(a).

[96] Hatchett v. Philander Smith Coll., 251 F.3d 670 (8th Cir. 2001) (concluding in part that an employee must be capable of performing all essential functions for the job she is to return to if she is to qualify for intermittent or reduced schedule leave).

Although all other benefits may cease during the leave period (e.g., life insurance, lease car), an employee on FMLA leave is entitled to have health benefits maintained and to receive any unconditional pay increases that occurred during absence and any bonuses that were earned prior to leaving. But, such employee is not entitled to bonuses earned during the absence (i.e., monthly production bonus) or to accrue seniority during leave (unless it is permitted within organizational policy or bargaining agreement).[97]

An employee on FMLA leave generally has the right to return to the same or equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. However, if the employee is unable to perform an essential function of the position due to a physical or mental condition, the employee has no right to reinstatement to the previous position and will have limited rights to other positions. (See discussion under "Transfer and Reassignment.")

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[97] However, if premiums are raised or lowered, the employee is required to pay the new premium rates. If an employee fails to pay his or her portion of the premium for thirty days or more, the employer's obligation to maintain health insurance coverage ceases under the FMLA, provided the employer gives the employee a fifteen-day written notice.

Most often, FMLA leave is unpaid. Where an employee has earned or accrued paid vacation, personal leave, or family leave, that paid leave may be substituted for all or part of any otherwise unpaid FMLA leave only if the employer's policy allows such paid leave.

The employee has the choice of filing a complaint with the Secretary of Labor or filing a private lawsuit within two years of the last violation. This limitations period is extended to three years if the act is determined to be willful. Where a violation is found, the employee can recover wages, employment benefits, and other lost compensation plus interest, reasonable attorneys' fees, costs of bringing the action and, when appropriate, equitable relief such as reinstatement and promotion.

Transfer and Reassignment

Under fairly narrow circumstances, transfer or reassignment may be required as a form of reasonable accommodation for existing personnel, but not for applicants. An applicant for a position must be qualified for and be able, possibly through the use of an accommodation, to perform the essential functions of the position for which he or she applied.[98] For some existing employees, however, transfer or reassignment to an open position may be necessary for them to continue in employment. A person may have been qualified for a current position, notwithstanding limitations imposed by a disability, but have experienced a decline in ability, mobility, manual dexterity, vision, hearing, general health, or the like to the degree that the essential functions of the job can no longer be performed even with accommodation. In essence this means that the person is no longer *qualified* for the current position. That does not necessarily mean, however, that the employment relationship has ended. At this point, the employer needs to engage in an interactive process with the employee to identify possible existing lines for which the employee still may qualify.[99] If an appropriate position is open, and other current employees do not have seniority or other rightful claim, the employee with a disability should be reassigned if determined to be the best-qualified applicant. Federal law does not require employers to remove an existing employee to create an opening, to create a new position, to reassign essential functions, to select someone other than the one who is "best qualified," or to violate collective bargaining agreements regarding "bumping" rights.[100]

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[98] Woodyard v. Hoover Group, Inc., 985 F.2d 421 (8th Cir. 1993) (permitting termination of an employee after it was determined that she was unqualified, even with accommodation, for any open position).

[99] 29 CFR § 1630.2(o)(3).

The First Circuit reviewed a related case, *Phelps v. Optima Health, Inc. and Catholic Medical Center,*[101] where a staff nurse eventually was terminated given her inability to lift fifty pounds, an essential function of the job (in fact, she had difficulty lifting twenty pounds). She had been able to maintain her job following her back injury because her sister (a nurse within the same unit) shared her patient load and performed the lifting for her. Other nurses also performed plaintiff's work upon request. Once a new nurse manager was assigned to her unit, however, this informal arrangement was terminated and plaintiff was dismissed from her current position. She then met with the human resource manager who suggested that she apply for an internal transfer to a position consistent with her physical limitations. The plaintiff required that any new position would have to have flexible scheduling and the same level of pay. When no such position could be identified, plaintiff was terminated.

The dismissed nurse contended that requiring other nurses to do the lifting typically required of the person holding the position would have represented a reasonable accommodation; such job-restructuring would have permitted her to return to her previous position. In the alternative, plaintiff proposed that she be assigned to a medicine nurse position (a job category that had been eliminated). The court disagreed that plaintiff's requested accommodations were reasonable and noted that the ADA did not require her employer to re-establish abolished positions or to reallocate essential functions of a contested position to other positions, even if it had done so before. To find otherwise, the court noted, would discourage employers from granting employees any accommodations beyond those required by federal law as once they had provided it, they would be obliged to do so again and again.

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[100] Ozlowski v. Henderson, No. 00-1079, 2001 U.S. App. LEXIS 604 (7th Cir., Jan. 17, 2001) (observing that an employer is not required to bump a current employee to allow a person with a disability to fill the position or to fill a vacant position it did not intend to fill for reasons independent of the employee's disability); Umphries v. Jones, 804 S.W.2d 38 (Mo. Ct. App. 1991) (holding that the instructional coordinator who suffered from epileptic-like seizures—she had been struck by the school van and suffered seizures ever since—could not be accommodated; assignment to the high school where there was an elevator or to a social studies class on the ground floor would have provided the necessary accommodation, but there were no vacancies and bumping of a more senior employee would usurp the legitimate rights of others; accordingly, her reassignment to a nonschool position was not permitted).

[101] Phelps v. Optima Health, Inc., 251 F.3d 21 (1st Cir. 2001).

In contrast, the Sixth Circuit, in *Kiphart v. Saturn Corporation*,[102] found that transfer to an open position qualified as a reasonable accommodation for an assembly-line worker. The company grouped laborers into teams with each individual responsible for one step of the manufacturing process. So that employees would understand the entire procedure and be able to better discuss problems they may be experiencing, the company theoretically required that all team members rotate positions, thereby gaining hands-on experience at each machine and in each phase of production. Notwithstanding this "required" procedure, the administration was aware that employees routinely swapped tasks or did not fully rotate, given either their personal aversion to performing certain tasks, their inability to perform certain tasks, or personal preference. The plaintiff had a range of hand, arm, and neck impairments (i.e., bilateral chronic ulnar neuropathy, tendinitis, fused cervical spine, and chronic depression) that restricted his mobility and ability to perform a number of repetitive functions (common to an assembly-line worker). Based on his limited performance ability, the company denied him assignment to permanent positions and placed him on involuntary medical leave for seven months. In reversing a lower court decision for the employer (in spite of a jury verdict to the contrary), the appeals court held that a reasonable jury could infer from the evidence that full-task rotation was not, in fact, an essential function of the job and that job reassignment qualified as a reasonable accommodation in this instance.

When the need for accommodations arises, employers typically provide them without hesitation and certainly without the creation of a hostile work environment. On rare occasions, however, employers have responded to employee demands or requests (or the filing of claims) by exposing them to hostility within the workplace or by wittingly or unwittingly permitting others to intimidate, belittle, or degrade them.

Hostile Environment

Hostile environment claims may be filed under either section 504 or the ADA. In such cases, the employee need not prove psychological injury but still must show that the employer either was directly responsible for the hostility or knew or reasonably should have known of the alleged misconduct but failed to remediate the action.[103] To decrease the likelihood that a hostile environment would ever evolve, employers need to refrain from inappropriate conduct and respond to employee concerns promptly and responsibly. Moreover, employers should provide information to all employees regarding inappropriate behaviors within the workplace, including a range of potential concerns such as race discrimination, sexual harassment, national origin discrimination, and the like. Among those topics discussed during in-service could be information regarding civility within the workplace and tolerance, if not respect, for individual differences.

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[102] Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001).

In addition to the above, the employer should establish related complaint procedures, investigate claims promptly and efficiently, and correct any behaviors that are found to have supported the claims. Persons engaged in creating a hostile work environment may be suspended, nonrenewed, or even terminated, depending on the magnitude of the offense, whether the behavior had been repeated, and the violator's past practice and conduct.

Adverse Employment Decisions

Persons with disabilities both succeed and fail in the workplace, as do persons without disabilities. At times they have been downsized, nonrenewed, suspended, transferred, demoted, not tenured, not promoted, or terminated. In some cases, such adverse decisions were due to violation of policy and directives,[104] poor performance or nonperformance,[105] inappropriate actions while on the job,[106] inadequate skills, or criminal wrongdoing.[107] Other times the employee's disability was the basis for either an adverse decision or the creation of an environment that was so hostile that the employee was forced to resign (i.e., the employee was constructively discharged).

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[103] Spells v. Cuyahoga Cmty. Coll., 889 F. Supp. 1023 (N.D. Ohio 1994) (granting summary judgment to the College regarding a former instructional aid's claim that he was subjected to a hostile work environment and discharged because of disability; there was insufficient proof that the employer (1) knew or reasonably should have known of the alleged hostile work environment or (2) failed to take prompt and remedial action).

[104] Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696 (4th Cir. 2001) (concluding that the plaintiff was fired because of his unwillingness to cooperate with his employer in its efforts to established the nature and extent of his alleged disability and to identify any necessary accommodations).

[105] Curtis v. University of Houston, 940 F. Supp. 1070 (S.D. Tex. 1996) (concluding that a former alcoholic professor was not discriminated against due to his disability but rather was denied promotion to full professor because of his poor academic performance); Bernard v. Avoyelles Parish Sch. Bd., 640 So. 2d 321 (La. Ct. App. 1994) (holding that the Board had the authority to dismiss a bus driver for willful neglect of duty, failure to receive medical treatment, and failure to report to work at the end of approved leave following incarceration and conviction of a felony, notwithstanding his claim that the termination was based on carpal tunnel syndrome); American Univ. v. District of Columbia

Where a claim is filed, the challenged action (e.g., failure to hire or promote, demotion, termination) by the employer will be justified if there is a legitimate, nondiscriminatory reason.[108] The archetypical response in cases claiming discrimination in hiring or promotion is simply that the employer selected the best-qualified candidate for the position.[109] In demotion and termination cases,

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Comm'n on Human Rights, 598 A.2d 416 (D.C. Cir. 1991) (holding that the manic-depressive university secretary failed to establish a *prima facie* showing of a violation of the Human Rights Act; the employer claimed that it fired her for poor job performance); Beck v. James, 793 S.W.2d 416 (Mo. Ct. App. 1990) (affirming a lower court decision upholding the termination of a teacher's contract based on incompetency and inefficiency; the teacher failed to prove her learning disability was the motivating factor instead of the District proffered reasons regarding instructional methods, communication skills, and classroom management—on one form she misspelled the names of twenty-six of her students, as well as her own, and materials sent home had numerous spelling and grammatical errors); Kent State Univ. v. Ohio Civil Right Comm'n, 581 N.E.2d 1135 (Ohio Ct. App. 1989) (holding that the University discriminated against a purchasing agent who suffered from laryngeal stridor with laryngospasm—a respiratory problem—when it suspended her; the plaintiff qualified as disabled and the University was found not to have adequately accommodated her disability, although some efforts were made).

[106] Griel v. Franklin Med. Ctr., 234 F.3d 731 (1st Cir. 2000) (concluding that a nurse who was a recovering drug addict was justifiably terminated for excessive violation of protocols; on one occasion she denied asking a new nurse to administer a drug she had drawn in violation of policy, but then equivocated and ultimately admitted to the violation after the administering nurse forthrightly acknowledged her own error); Newberry v. East Texas State Univ., 161 F.3d 276 (5th Cir. 1998) (concluding that a professor was dismissed due to unprofessional conduct, failure to attend meetings, harassment of colleagues, and poor work ethic rather than disability); Susie v. Apple Tree Preschool and Child Care Ctr., 866 F. Supp. 390 (N.D. Iowa 1994) (denying summary judgment as fact issues remained regarding motivation in discharging a teacher with epilepsy; school authorities had proposed that the plaintiff was fired for writing a letter to a student's parents and not due to her disability).

[107] Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) (upholding dismissal of employee in part for driving under the influence of alcohol).

[108] 29 CFR § 1630.15(a).

[109] Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985) (affirming summary judgment for the District in a case where a legally blind applicant to a librarian position was denied employment; plaintiff failed to prove that disability was the sole reason she was denied employment as the successful candidate was considered better qualified).

employers have been successful in identifying a range of admissible and nondiscriminatory bases for their adverse decisions (e.g., failed to maintain records, theft, insubordination, neglect of duty, immorality).

To prevail in an adverse action case, the plaintiff must show that the proffered reason given for the decision was untrue and that the true reason was a form of illegal discrimination. Proof for such a claim can be either direct or circumstantial. In a related matter, the Supreme Court, in *Reeves v. Sanderson Plumbing Products, Inc.*,[110] reviewed an age-discrimination claim where the terminated plaintiff was in his fifties and was replaced by persons in their thirties. His employer contended that the termination was justified due to plaintiff's failure to maintain accurate attendance records, thereby affecting payroll. In response, the plaintiff presented substantial evidence that could convince a reasonable jury that the representation by the employer was untrue; he did not show, however, through direct evidence that the basis for the termination was actually age. The Court reasoned that direct evidence was not necessary in every claim; at times a plaintiff's *prima facie* case, in combination with sufficient evidence to question the mendacity of the employer's statements, *may* permit a court to conclude that unlawful discrimination has occurred. The Court did warn though that liability will not necessarily be justified each time a plaintiff challenges his or her employer's stated reason (e.g., where another nondiscriminatory reason is shown to be the basis or where only weak evidence supported the plaintiff's position as compared to abundant and uncontroverted evidence in favor of the defendant).

In a case involving an employee with a disability, a federal district court, in *Schwarz v. Northwest Iowa Community College*,[111] denied summary judgment where a librarian claimed that she had been constructively discharged. Interestingly, the court concluded that the plaintiff did not have a qualifying disability (i.e., her night blindness was not substantially limiting in that she was not disqualified from a wide range of jobs), but may have been forced to resign. Her schedule was changed from 8:00 a.m.-4:30 p.m. to 12:30 p.m.-9:00 p.m. with the prior knowledge of plaintiff's vision impairment. Moreover, her supervisor on numerous occasions asked her when she expected to retire, even though she had repeatedly told the supervisor that she had no such intention in the near future. Reasons given for the schedule change (i.e., accreditation, increase in evening library traffic, inadequate skills to assist faculty during day hours) also appeared subject to legitimate dispute. The court further averred that, to prevail, the librarian need not prove that her employer consciously meant to force her to quit; in the alternative, she must show that the college intended the reasonably foreseeable consequences of its actions.

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[110] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

[111] Schwarz v. Northwest Iowa Cmty. Coll., 881 F. Supp. 1323 (N.D. Iowa 1995).

In contrast, the Eighth Circuit in *Cadelli v. Fort Smith School District*[112] reviewed a case where the plaintiff was a twenty-three year teacher with an Anxiety Panic Disorder (a disorder accompanied by panic attacks, obsessional thinking, and fearfulness). He was medicated, which allowed him to cope with most everyday life situations, but also was suffering from short-term memory loss and hearing deficits due to injuries sustained in a car accident. The plaintiff claimed that he was coerced into retirement even though no one from the district had ever discussed retirement with him, while his own physician stated that his ailments rendered him unable to continue teaching. The court held that the plaintiff had voluntarily resigned and that there was no statutory violation.

Retaliation Claims

It is unlawful to retaliate against a person with a disability because that person made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing based on ADA provisions.[113] As would be imagined, retaliation claims are difficult to prove; employers seldom confess to wrongdoing and seem always to identify if not generate some permissible basis for the adverse action experienced by the plaintiff. Importantly, however, is that the plaintiff need not win a disability discrimination suit to prevail in retaliation litigation. Moreover, it need not be the person with a disability filing the retaliation suit; it could be someone who testified for the original plaintiff, the person who encouraged him or her to fill a discrimination claim, or the individual who may have argued the case with the administration (e.g., a union representative; a tenured colleague).

In *Foster v. Time Warner Entertainment Company*,[114] the plaintiff purported that she had been terminated for conduct protected under the ADA: she had permitted an employee with nocturnal seizures due to epilepsy and medication-related problems to make up work after hours or on the weekend. This accommodation, which also had been permitted by her predecessor, resulted in complaints by co-workers and a policy change by a high level supervisor prohibiting employees from making up time they missed due to illness. In time, the employee with a disability and the plaintiff (his immediate supervisor) were terminated—the former for falsifying his time sheet and the later for colluding in the misrepresentation. The facts in the case neither support nor refuted whether falsification had occurred. Nevertheless, during the time of employment, higher level administrative personnel refused to provide accommodation for the employee with a disability. The dismissed supervisor was told not to worry about the ADA, that the company did not have to follow the ADA, and that prior accommodations in the policy manual did not bind her decision-making authority. The Eighth Circuit upheld a jury verdict for the plaintiff, including an award of punitive damages in the amount of $136,000 after a consideration of the degree of reprehensibility of the defendant's conduct, the ratio or relationship between the actual harm inflicted on the plaintiff and the punitive award, and civil penalties authorized or imposed for similar misconduct.

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[112] Cadelli v. Fort Smith Sch. Dist., 23 F.3d 1295 (8th Cir. 1994).

[113] 29 CFR § 1630.12.

[114] Foster v. Time Warner Entertainment Co., 250 F.3d 1189 (8th Cir. 2001).

Guidelines for the Practitioner

In practice, many acts of disability discrimination will go unchallenged, because the plaintiff lacks sufficient knowledge of federal law, the requisite time and energy to litigate, or the necessary finances. It is equally clear, however, that many suits that are filed do not support the claim that the employer discriminated because of disability. Furthermore, some of the allegations may be "unfair" from the perspective of the employee, yet not qualify as "illegal" from the perspective of the courts.

The number of disability employment cases is likely to increase, given the availability of damage awards under section 504 and some state statutes,[115] the common perception that the ADA provides broad-based coverage and high awards (even if only in the private sector), and the fact that a growing number of individuals with disabilities are entering the workforce. The cost of many accommodations, along with the tightening of state and local budgets, however, should make accommodation cases among the more volatile.

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[115] Rodgers v. Magnet Cove Pub. Schs., 34 F.3d 642 (8th Cir. 1994) (holding that the Supreme Court's decision in Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992) and its own decision in Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982) supported a money damage claim under § 504; however, it remanded the case for a determination of whether a nonrenewed teacher was entitled to a remedy—she had exhibited excessive moodiness, extreme irritability, weight loss, impulsivity, excessive talkativeness, hostility, aggressiveness, poor judgment, easy distractibility, increased motor activity, and reckless behavior).

Although discrimination law for persons with disabilities is only just now evolving in the courts and trends are difficult to identify, this chapter should have provided some guidance to college administrators in their efforts to both accommodate qualified persons with disabilities and avoid litigation. The following is a brief summary of some the more important points:

(1) The employee is responsible for documenting a disability that substantially limits a major life activity (including working).

(2) "Substantially limits" is judged *in comparison to the average person in the general population*.

(3) Mitigating and corrective measures may be considered in the determination of whether a person is substantially limited in a major life activity.

(4) Current abusers of alcohol and illegal drugs will not qualify as disabled.

(5) Persons who pose a direct threat to the safety of self or others in the workplace will not be otherwise qualified for the position.

(6) It is possible for a plaintiff to qualify as disabled under SSDI and title I simultaneously, if accommodations had not been provided while the plaintiff was working.

(7) The person to be hired must be able to perform all functions that qualify as essential, unless the employer voluntarily elects to redefine positions.

(8) Essential functions should be used to prepare job descriptions and advertisements.

(9) The job description should provide relative detail as to what is required for a given position.

(10) Questions regarding an applicant's possible disability should not be asked during the preoffer interview stage.

(11) Federal law does not require colleges to practice affirmative action in the recruitment of persons with disabilities (except those that qualify as section 503 contractors and then only within the execution of the contract). However, federal law does not prohibit colleges from practicing affirmative action in regard to persons with disabilities.

(12) Questions and examinations that relate to the nature and extent of a possible disability may be asked or administered during the postoffer interview stage.

(13) If a conditional job offer is rescinded, the employer will be responsible for showing either that the criterion did not disproportionately screen out persons with disabilities, or that the criterion is job-related and consistent with business necessity.

(14) Employers are not required to hire less well-qualified applicants or even applicants that are equally qualified to one that is disabled; disability should neither advantage nor disadvantage an applicant in the hiring or employment process.

(15) Employers should engage employees in an informal, interactive process to determine accommodation preferences.

(16) Notwithstanding number fifteen above, employers still have the authority to select among effective alternatives, perhaps due to cost or convenience.

(17) Some requests will prove excessive and result in undue hardship; hardship is subjective, however, and is based on factors such as size of budget, number of employees, cost of accommodation, and the like.

(18) Employers should not discriminate in regard to any term or condition of employment, including compensation, leave, promotion, and so on.

(19) Persons with disabilities should not be subjected to harassment based on disability either by the employer or by other employees.

(20) Federal law also protects persons with disabilities from being subjected to a hostile work environment for having filed a complaint or suit based on disability; such laws also protect those who may have assisted in the filing of a claim and those that give their moral or financial support to such end.

(21) Federal law does not require that employees be retained when they have not merited retention; they simply cannot be dismissed because they are disabled or because they require accommodation.

(22) All similarly classified personnel should be held to the same standards and expectations, even though some may need accommodation during the process.

(23) Be fair, be honest, and be forthright with all employees, including those with disabilities.

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